

INTERMEDIATE (IPC) COURSE

STUDY MATERIAL

PAPER : 2

BUSINESS LAW, ETHICS AND COMMUNICATION

MODULE – 2



BOARD OF STUDIES
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

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The Companies Act, 2013

UNIT 1- PRELIMINARY

Learning Objectives

In this unit the students are exposed to the working knowledge on the introductory part of the Companies Act, 2013, covering the following aspects:

- ◆ Company and Corporate Veil
- ◆ Classes of companies under the Companies Act
- ◆ Registration and incorporation of companies
- ◆ Memorandum of Association and Articles of Association and their alteration
- ◆ Contracts entered at the time of incorporation
- ◆ Promoters and their duties
- ◆ Service of documents

1.0 Introduction

The Companies Act, 2013 has been enacted to consolidate and amend the law relating to the companies. The changes in the existing company law (i.e., the Companies Act, 1956) were indispensable due to change in the national and international economic environment and for expansion and growth of economy of our country, the Central Government decided to replace the Companies Act, 1956 with a new legislation to meet the changed national and international economic environment and to further accelerate the expansion and growth of our economy. The new law (i.e., the Companies Act, 2013) is rule based legislation with 470 sections and seven schedules. The entire Act has been divided into 29 chapters. The Companies Act, 2013 aims to improve corporate governance, simplify regulations, strengthen the interests of minority investors and for the first time legislates the role of whistle-blowers. Thus, the enactment making our corporate regulations more contemporary.

Relevant notifications on the Companies Act, 2013: On 12th September, 2013, the Central Government (Ministry of Corporate Affairs) has notified 98 sections of the Companies Act, 2013 effective from the issue date i.e. 12th September, 2013. On 13th September, 2013, the Ministry of Corporate Affairs vide Circular No.15/2013 issued a clarification with a view to facilitate proper administration of the Companies Act, 2013 with respect to the implementation

6.2 Business Law, Ethics and Communication

of the sections 2(68), 102, 133 and 180. On 18th September, 2013, the Ministry of Corporate Affairs vide Circular No. 16/2013 has issued another clarification that with effect from 12th September, 2013, the relevant provisions of the Companies Act, 1956, which correspond to provisions of 98 sections of the Companies Act, 2013 brought into force on 12th September, 2013, shall cease to have effect from that date. The Ministry of Corporate Affairs issued an order on 20th September, 2013 with respect to the removal of difficulties in compliances with the sections 24, 58 and 59 of the Companies Act, 2013. Vide General Circular no. 20/ 2013, the Ministry of Corporate Affairs has issued a clarification with regard to holding of shares or exercising power in a Fiduciary capacity in determining of holding and subsidiary relationship under section 2(87) of the Companies Act, 2013. With the Notification dated 26th March, 2014, the Ministry of Corporate Affairs further notified 183 new sections of the Companies Act, 2013 and Rules there under to be made effective from 1.04.2014(except certain provisions, under chapter XV, XVI, XVIII, XIX, XX, part II chapter XXI, chapter XVII, chapter XXVIII). Most of the existing e - forms were replaced by new e - forms from the said date.

Short title, extent, commencement and application: Statute enacted to consolidate and amend the law relating to the companies may be called the Companies Act, 2013. It extends to the whole of India and came into existence at once from the date of notification in the Official Gazette i.e., from 30th August, 2013, however, the remaining provisions of the Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act and any reference in any provision to the commencement of this Act shall be taken as a reference to the coming into force of that provision.

The provisions of the Act shall apply to-

- Companies incorporated under this Act or under any previous company law
- Insurance companies(except where the provisions of the said Act are inconsistent with the provisions of the Insurance Act ,1938 or the IRDA Act,1999)
- Banking companies(except where the provisions of the said Act are inconsistent with the provisions of the Banking Regulation Act,1949)
- Companies engaged in the generation or supply of electricity(except where the provisions of the above Act are inconsistent with the provisions of the Electricity Act,2003)
- Any other company governed by any special Act for the time being in force.
- Such body corporate which are incorporated by any Act for time being in force, and as the Central Government may by notification specify in this behalf.

Section 1 of the Companies Act, 2013 has been made flexible with respect to enforceability of various sections on different dates and makes position clear as to application of this Act from 1.04.2014, except certain provisions.

1.1 What is a Company?

Section 2(20) of the Companies Act, 2013 defines the term 'company': "Company means a company incorporated under this Act or under any previous company law". The definition does not bring out clearly the meaning of a company. For a layman, the term "company" signifies a business organisation. But all business organisations cannot be technically called 'companies'. There are distinctive features between different forms of organisations and the most striking feature in the company form of organisation vis-à-vis the other organisations is that it acquires a unique character of being a separate legal entity. In other words when a company is registered, it is clothed with a legal personality. It comes to have almost the same rights and powers as a human being. Its existence is distinct and separate from that of its members. Members may die or change, but the company goes on till it is wound up on the grounds specified by the Act. In other words, it means that it has perpetual succession. A company can own property, have banking account, raise loans, incur liabilities and enter into contracts. Even members can contract with company, acquire right against it or incur liability to it. For the debts of the company, only its creditors can sue it and not its members. Also in contrast to other forms of organization, the member of the company usually has a limited liability.

As the company is an artificial person, it can act only through some human agency, viz., directors. They control affairs of the company and act as its agency, but they are not the "agents" of the members of the company. A company has a common seal to authenticate its formal acts.

1.2 Lifting of the "Corporate Veil"

In *Salomon vs. Salomon & Co. Ltd.* [1897] A.C. 22 the House of Lords laid down that a company is a person distinct and separate from its members. In this case one Salomon incorporated a company named "Salomon & Co. Ltd.", with seven subscribers consisting of himself, his wife, four sons and one daughter. This company took over the personal business assets of Salomon for £ 38,782 and in turn, Salomon took 20,000 shares of £ 1 each, debentures worth £ 10,000 of the company with charge on the company's assets and the balance in cash. His wife, daughter and four sons took up one £ 1 share each. Subsequently, the company went into liquidation due to general trade depression. The unsecured creditors contended that Salomon could not be treated as a secured creditor of the company, in respect of the debentures held by him, as he was the managing director of one-man company, which was not different from Salomon and the cloak of the company was a mere sham and fraud. It was held by Lord MacNaghten:

"The Company is at law a different person altogether from the subscribers to the memorandum, and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the Act."

Thus, this case clearly established that company has its own existence and as a result, a shareholder cannot be held liable for the acts of the company even though he holds virtually the entire share capital. The whole law of corporation is in fact based on this theory of corporate entity. Now, the question may arise whether this *Veil of Corporate Personality* can even be lifted or rend (*i.e.*, torn).

Before going into this question, one should first try to understand the meaning of the phrase "lifting the veil". It means looking behind the company as a legal person, *i.e.*, disregarding the corporate entity and paying regard, instead, to the realities behind the legal facade. Where the Courts ignore the company and concern themselves directly with the members or managers, the corporate veil may be said to have been lifted. Only in appropriate circumstances, the Courts are willing to lift the corporate veil and that too, when questions of control are involved rather than merely a question of ownership.

The following are the cases where company law disregards the principle of corporate personality or the principle that the company is a legal entity distinct and separate from its shareholders or members:

- (1) In the law relating to trading with the enemy where the test of control is adopted. The leading case in this point is *Daimler Co. Ltd. vs. Continental Tyre & Rubber Co.* [1916] 2 A.C. 307, if the public interest is not likely to be in jeopardy, the Court may not be willing to crack the corporate shell. But it may rend the veil for ascertaining whether a company is an enemy company. It is true that, unlike a natural person, a company does not have mind or conscience; therefore, it cannot be a friend or foe. It may, however, be characterised as an enemy company, if its affairs are under the control of people of an enemy country. For this purpose, the Court may examine the character of the persons who are really at the helm of affairs of the company.
- (2) In certain matters concerning the law of taxes, duties and stamps particularly where question of the controlling interest is in issue. [*S. Berendsen Ltd. vs. Commissioner of Inland Revenue* [1953] Ch. 1. (C.A.)]. Where corporate entity is used to evade or circumvent tax, the Court can disregard the corporate entity [*Juggilal vs. Commissioner of Income Tax* AIR (1969) SC (932)]. In [*Dinshaw Maneckjee Petit* AIR 1927 Bom.371], it was held that the company was not a genuine company at all but merely the assessee himself disguised under the legal entity of a limited company. Where it was found that the sole purpose for the formation of the company was to use it as a device to reduce the amount to be paid by way of bonus to workmen, the Supreme Court upheld the piercing of the veil to look at the real transaction (*The Workmen Employed in Associated Rubber Industries Limited, Bhavnagar vs. The Associated Rubber Industries Ltd., Bhavnagar and another*, AIR 1986 SC1).
- (3) Where companies form other companies as their subsidiaries to act as their agent. The application of the doctrine may operate in favour of such companies depending upon the facts of a particular case. Suppose, a company acquires a partnership concern and registers it as a company, which becomes subsidiary of the acquiring company. In an

action for compulsory acquisition of the business premises of the subsidiary, it was held that the parent company (which through itself and nominees held all the shares) was entitled to compensation, maintain action for the same [*Smith, Stone and Knight Ltd. vs. Lord Mayor, etc., of Birmingham* [1939] 4, All. 116].

- (4) Under the law relating to exchange control.
- (5) Where the device of incorporation is adopted for some illegal or improper purpose, *e.g.*, to defeat or circumvent law, to defraud creditors or to avoid legal obligations.

1.3 Classes of Companies under the Act

The growth of the economy and increase in the complexity of business operation in the corporate world has led to the emergence of different forms of corporate organizations. To regulate them the Companies Act, 2013 has broadly classified the companies into various class.

A company may be incorporated as a one person company, private company or a public company, depending upon the number of members joining it. Again it may either be an unlimited company, or may be limited by shares or by guarantee or by both. On the basis of control, companies can be classified as associate company, holding company and subsidiary company. Some other forms of classification of companies are: foreign company, government company, small company, dormant company, nidhi company and company formed for charitable objects.

Companies may be classified into various classes on the following basis:

1. On the basis of liability:

(a) Company limited by shares: Section 2(22) of the Companies Act, 2013, defines that when the liability of the members of a company is limited by its memorandum of association to the amount (if any) unpaid on the shares held by them, it is known as a company limited by shares. It thus implies that for meeting the debts of the company, the shareholder may be called upon to contribute only to the extent of the amount, which remains unpaid on his shareholdings. His separate property cannot be encompassed to meet the company's debt.

It may be worthwhile to know that though a shareholder is a co-owner of the company, he is not a co-owner of the company's assets. The ownership of the assets remains with the company, because of its nature - as a legal person. The extent of the rights and duties of a shareholder as co-owner is measured by his shareholdings. Thus, all the shareholders of the company are its proprietors, the amount due from all of them is the issued capital of the company. A company limited by shares needs fund for its working, it raises its fund by issuing shares. When the shares are issued, these may be subscribed by the signatories to the memorandum or may be therefore allotted to applicants therefore, either for cash or for consideration in kind.

(b) Company limited by guarantee: Section 2(21) of the Companies Act, 2013 defines it as the company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the

company in the event of its being wound up. Thus, the liability of the member of a guarantee company is limited upto a stipulated sum mentioned in the memorandum. Members cannot be called upon to contribute beyond that stipulated sum.

Similarities and dis-similarities between the Guarantee Company and the Company having share capital:

The **common features** between a 'guarantee company' and 'share company' are legal personality and limited liability. In the latter case, the member's liability is limited by the amount remaining unpaid on the share, which each member holds. Both of them have to state in their memorandum that the members' liability is limited.

However, the **point of distinction** between these two types of companies is that in the former case the members may be called upon to discharge their liability only after commencement of the winding up and only subject to certain conditions; but in the latter case, they may be called upon to do so at any time, either during the company's life-time or during its winding up.

It is clear from the definition of the guarantee company that it does not raise its initial working funds from its members. Therefore such a company may be useful only where no working funds are needed or where these funds can be held from other sources like endowment, fees, charges, donations, etc.

Further to note, the Supreme Court in *Narendra Kumar Agarwal vs. Saroj Maloo (1995) 6 SC C 114* has laid down that the right of a guarantee company to refuse to accept the transfer by a member of his interest in the company is on a different footing than that of a company limited by shares. The membership of a guarantee company may carry privileges much different from those of ordinary shareholders.

(c) Unlimited company: Section 2(92) of the Companies Act, 2013 defines such unlimited company as a company not having any limit on the liability of its members. In such a company the liability of a member ceases when he ceases to be a member.

The liability of each member extends to the whole amount of the company's debts and liabilities but he will be entitled to claim contribution from other members. In case the company has a share capital the articles of association must state the amount of share capital and the amount of each share. So long as the company is a going concern the liability on the shares is the only liability which can be enforced by the company, though the liability of the members is unlimited so far as creditors are concerned. [Re. *Mayfair Property Co. Bartlett vs. Mayfair Property Co.* [1898] 2 Ch. 28].

2. On the basis of members:

(a) One person company: The Companies Act, 2013 introduces a new class of companies which can be incorporated by a single person. Section 2(62) of the Companies Act, 2013 defines one person company (OPC) as a company which has only one person as a member. One person company has been introduced to encourage entrepreneurship and corporatization of business. OPC differs from sole proprietary concern in an aspect that OPC is a separate legal entity with a limited liability of the member whereas in the case of sole proprietary, the

liability of owner is not restricted and it extends to the owner's entire assets constituting of official and personal.

The procedural requirements of an OPC are simplified through exemptions provided under the Act in comparison to the other forms of companies.

According to section 3(1)(c) of the Companies Act, 2013, OPC is a private limited company with the minimum paid up share capital of Rs. 1 lakh and has at least one member. Here the member can be the sole member and director.

Comparison between OPC and Private company:

Basis of difference	Private company	OPC
Incorporation	Requires 2 or more persons	1 person alone
Paid-up share capital	Minimum paid up share capital of Rs 1 lakh or such higher paid up share capital as may be prescribed under the articles	Has Paid up share capital of Rs. 1lakh.
Number of members	2 members	1 member only
Right to transfer share	Right of member to transfer the shares can be restricted by article	Choice to restrict the right to transfer share is available to OPC

(b) Private Company [Section 2(68)]: Means a company having a minimum paid-up share capital of one lakh rupees or such higher paid-up share capital as may be prescribed, and which by its articles,—

- (i) restricts the right to transfer its shares;
- (ii) limits the number of its members to two hundred (except in case of One Person Company):

The clause provides that where two or more persons hold one or more shares in a company jointly, they shall be treated as a single member:

However following shall not be included in the number of members:

- ◆ persons who are in the employment of the company; and
- ◆ persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased.

- (iii) prohibits any invitation to the public to subscribe for any securities of the company.

Small company given under the section 2(85) of the Companies Act, 2013 which means a company, other than a public company,—

(i) **paid-up share capital** of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or

(ii) **turnover** of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Exceptions: This section shall not apply to :

(A) a holding company or a subsidiary company;

(B) a company registered under section 8; or

(C) a company or body corporate governed by any special Act;

(c) **Public company [Section 2(71)]:** The Companies Act, 2013, defines public company as a company which-

- is not a private company
- has a minimum paid up share capital of 5 lakh rupees or such higher paid up capital as may be prescribed
- Seven or more members are required to form the company.

This section provides that a company which is subsidiary of a company(not being a private company) shall be deemed to be public company even where such subsidiary company continues to be a private company in its articles.

3. On the basis of control:

(a) **Holding and subsidiary companies:** 'Holding and subsidiary' companies are relative terms. A company is a holding company in relation to one or more other companies, means a company of which such companies are subsidiary companies.[section 2(46)].

Whereas section 2(87) defines "subsidiary company" in relation to any other company (that is to say the holding company), means a company in which the holding company—

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:

*Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

[* Yet to be notified]

For the purposes of this section —

- (I) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;
- (II) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;
- (III) the expression "company" includes anybody corporate;
- (IV) *"layer" in relation to a holding company means its subsidiary or subsidiaries;

***yet to be notified**

Any of the three circumstances illustrated below must exist to constitute the relationship of holding and subsidiary companies.

(A) A will be subsidiary of B, if B controls the composition of the Board of Directors of A, i.e., if B can, without the consent or approval of any other person, appoint or remove a majority of directors of A. B will be deemed to possess the power to appoint majority of persons as directors of A: (i) when these persons cannot be appointed in that capacity without B's consent, or (ii) when their appointments follow necessarily from their appointment as directors, manager or the holder of any office in B company, or (iii) when the holding company (i.e., B) itself or its another subsidiary holds the directorship in 'A' company [Section 2(46) and 2(87)].

(B) (i) A will be a subsidiary of B, if B is entitled to exercise control over more than half the total voting power of A, where A is an existing company in respect of which the holders of preference shares, issued before the commencement of the Companies (Amendment) Act, 1960 had the same voting rights in all respects as the holders of equity shares.

(ii) Again, A will be subsidiary of B, if B holds more than half of total share capital, where A is any company other than the one specified under (i) above. In other words, B must hold more than 50% of the share capital on the basis of the nominal capital whatever may be the amount paid up on the shares [Sections 2(46) and (87)].

For the purpose of condition described in para (ii) above, the shares that a company holds must be held in its own right and not merely in fiduciary capacity. Thus, the shares held in trust for an individual are to be excluded. On the other hand, shares held by another person as a nominee for the company or any of its subsidiaries should be regarded as being held by the company for the purpose.

In order to determine whether a company is a subsidiary of another, shares held by any person under the provisions of any debentures are not to be taken into account. Also, where a company's ordinary business includes money-lending, shares of other company held as security in a normal business transaction are to be disregarded.

(C) A company will be subsidiary of another company called holding company, if it is a subsidiary of a subsidiary of the holding company. For example, B is a subsidiary of A and C is a subsidiary of B. In such a case, C will be the subsidiary of A. In the like manner, if D is a

subsidiary of C, D will be subsidiary of B as well as of A and so on [Section 2(87)].

It may be noted that the phrase “controls the composition of board of directors’ is to be read in accordance with and only in accordance with Sub-section (87) of Section 2 of the Companies Act, 2013 and that sub-section conceives of control if but only if, the company which claims control can appoint or remove the holders of all or a majority of the directorships by the exercise of some power exercisable by it at its discretion without the consent or concurrence of any other person. Section 2(87) of the Companies Act, 2013 envisages the existence of subsidiary companies in different circumstances. It may be that by acquiring sufficient share capital of a company sufficient control may be obtained over that company to enable control in the composition of board of directors. But it is also possible to obtain such control in regard to the composition of the board without making such an investment in equity capital of the company. Such a control may be by reasons of an agreement such as where one company may agree to advance funds to another company and in return may, under the terms of an agreement surrender control over the right to appoint all or a majority of the board of directors. The first of the cases envisaged in section 2(87)(i) is the case where a control is obtained by a company in the matter of composition of the board of directors of another company. That would be sufficient to constitute the former as holding company and the other as subsidiary. The second type of case given in section 2(87)(ii) is where more than half of the total share capital is held by another company. By virtue of such holding that other company becomes a holding company and the one whose shares are so held becomes a subsidiary company. That other company is also a subsidiary of the holding company of the subsidiary.

Status of private company, which is subsidiary to public company: In view of Section 2(71) of the Companies Act, 2013 a Private company, which is subsidiary of a public company shall be deemed to be public company for the purpose of this Act, even where such subsidiary company continues to be a private company in its articles.

Subsidiary company not to hold shares in its holding company: Normally, a subsidiary company cannot be a member of its holding company. Where, however, it was a member before it becomes subsidiary, it shall not have the voting right at a meeting though it may exercise other rights of members [Section 19 (c) of the Companies Act, 2013].

Section 19 of the Companies Act, 2013, specifies the circumstances that constitute the relationship of the holding and the subsidiary company. Section 19 deals with the restrictions on the subsidiary company with respect to holding of shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiaries companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void.

According to section 19 of the Companies Act, 2013, no company shall, either by itself or through its nominees-

- (i) hold any shares in its holding company, and
- (ii) no holding company shall allot or transfer its shares to any of its subsidiary companies,

- and any such allotment or transfer of shares of a company made to its subsidiary company, shall be void.

Following are the **exceptions** -

- (a) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or
- (b) where the subsidiary company holds such shares as a trustee; or
- (c) where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company.

The subsidiary company referred to in the above exceptions shall have a right to vote at a meeting of the holding company only in respect of the shares held by it as a legal representative or as a trustee, as referred to in clause (a) or clause (b) of the said exceptions.

The reference in this section to the shares of a holding company which is a company limited by guarantee or an unlimited company, not having a share capital, shall be construed as a reference to the interest of its members, whatever be the form of interest.

(b) Associate company: In relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

The term "significant influence" means control of at least 20% of total share capital, or of business decisions under an agreement. [section 2(6)]

The term "Total Share Capital", means the aggregate of the -

- (a) paid-up equity share capital; and
- (b) convertible preference share capital.

This is a new definition inserted in the 2013 Act.

The 1956 Act does not prescribe any definition of the 'Associate', the relationship between the entities may be established either by way of establishment of holding- subsidiary relationship or by defining companies under same management. So this definition is added in the new law to limit all the shortcomings and provide a more rational and objective framework of associate relationship. Thus, specific definition of associate company is given in the 2013 Act to provide more governance in corporate transaction. The concept of associate has been inserted in the definition of related party for determining the related party transactions, Disclosure with its respect in the financial statements, Ascertaining independence of independent director and auditor during the appointment.

Vide General Circular no. 24/2014 dated 25th of June 2014 Ministry of Corporate Affairs issued a clarification with regard to holding of shares in a fiduciary capacity by associate company under section 2(6) of the Companies Act, 2013.

It is clarified that the shares held by a company in another company in a 'fiduciary

capacity' shall not be counted for the purpose of determining the relationship of 'associate company' under section 2(6) of the Companies Act, 2013.

4. On the basis of access to capital:

(a) **Listed company:** As per the definition given in the section 2(52) of the Companies Act, 2013, it is a company which has any of its securities listed on any recognised stock exchange. Whereas the word securities as per the section 2(81) of the Companies Act, 2013 has been assigned the same meaning as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956.

(b) **Unlisted company:** means company other than listed company.

5. Other companies:

(a) **Government company:** " means any company in which not less than fifty- one per cent. of the paid-up share capital is held by-

- (i) the Central Government, or
- (ii) by any State Government or Governments, or
- (iii) partly by the Central Government and partly by one or more State Governments,

And the section includes a company which is a subsidiary company of such a Government company;

(b) **Foreign Company:** means any company or body corporate incorporated outside India which—

- (i) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (ii) conducts any business activity in India in any other manner

According to the Companies (**Specification of definitions details**) Rules, 2014, "electronic mode", given here in the definition means carrying out electronically based, whether main server is installed in India or not, including, but not limited to-

- (i) business to business and business to consumer transactions, data interchange and other digital supply transactions;
- (ii) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;
- (iii) financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management;
- (iv) online services such as telemarketing, telecommuting, telemedicine, education and information research; and
- (v) all related data communication services,

whether conducted by e-mail, mobile devices, social media, cloud computing, document

management, voice or data transmission or otherwise;

(c) Formation of companies with charitable objects etc:

Section 8 of the Companies Act, 2013 deals with the formation of companies which are formed to promote the charitable objects of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment etc. Such company intends to apply its profit in promoting its objects and prohibiting the payment of any dividend to its members.

Power of Central government to issue the license -This section allows the Central Government to register such person or association of persons as a company with limited liability without the addition of words 'Limited' or 'Private limited' to its name, by issuing licence on such conditions as it deems fit. The registrar shall on application register such person or association of persons as a company under this section.

As per the Notification S.O. 1353(E), dated 9th Of July, 2014. In exercise of powers conferred by Section 458 of the Companies Act, 2013 & in supersession of the notification of the Government of India, MCA, dated the 10.07.2012 published in the Gazette of India, Extraordinary, Part-II, Sec-3, sub-sec (ii) vide no. S.O. 1538(E), dated 10.07.2012, in so far as it relates to items (a) to (b) & items (d) to (e), except as respect things done or omitted to be done before such supersession, the Central Government hereby delegates to the ROC the power & functions vested in it under the this section[i.e. section 8(1)] of the said Act, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers & functions under the said sections, if in its opinion, such course of action is necessary in the public interest.

On registration the company shall enjoy same privileges and obligations as of a limited company.

Revocation of license: The Central Government may by order revoke the licence of the company where the company contravenes any of the requirements or the conditions of this sections subject to which a licence is issued or where the affairs of the company are conducted fraudulently, or violative of the objects of the company or prejudicial to public interest, and on revocation the Registrar shall put 'Limited' or 'Private Limited' against the company's name in the register. But before such revocation, the Central Government must give it a written notice of its intention to revoke the licence and opportunity to be heard in the matter.

Vide Notification S.O. 1352(E) dated 21.05.2014 in exercise of powers conferred by Section 458 of the Companies Act, 2013 & in supersession of the notification of the Government of India, MCA, dated the 10.07.2012 published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-Section (ii) vide no. S.O. 1539(E), dated 10.07.2012, in so far as it relates to items (a) to (f) & items (n), except as respect things done or omitted to be done before such supersession, the Central Govt. hereby delegates to the RD at Mumbai, Kolkata, Chennai, Noida, Ahmedabad, Hyderabad & Shillong, the power

& functions vested in it under the following sections of the said Act, subject to the condition that the Central Govt. may revoke such delegation of powers or may itself exercise the powers & functions under this section [i.e.8(5)], if in its opinion, such course of action is necessary in the public interest,-

A company registered under section 8 which intends to convert itself into a company of any other kind shall pass a special resolution at a general meeting for approving such conversion.

[The Companies (Incorporation) Rules, 2014]

Order of the Central Government: Where a licence is revoked there the Central Government may, in the public interest order that the company registered under this section should be amalgamated with another company registered under this section having similar objects, to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order, or the company be wound up.

Penalty/ punishment in contravention: If a company makes any default in complying with any of the requirements laid down in this section, the company shall, be punishable with fine varying from ten lakh rupees to one crore rupees and the directors and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine varying from twenty-five thousand rupees to twenty-five lakh rupees, or with both. And where it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447.

(d) Dormant company: Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

“Significant accounting transaction” means any transaction other than—

- (i) payment of fees by a company to the Registrar;
- (ii) payments made by it to fulfil the requirements of this Act or any other law;
- (iii) allotment of shares to fulfil the requirements of this Act; and
- (iv) payments for maintenance of its office and records.

(e) Nidhi Companies: Company which has been incorporated as a nidhi with the object of cultivating the habit of thrift (cost cutting) and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefits and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies.[Section 406 of the Companies Act,2013]

(f) Public financial institutions: By virtue of Section 2(72) of the Companies Act, 2013 the following institutions are to be regarded as public financial institutions.

- (i) the Life Insurance Corporation of India, established under the Life Insurance Corporation Act, 1956;
- (ii) the Infrastructure Development Finance Company Limited,
- (iii) specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002;
- (iv) institutions notified by the Central Government under section 4A(2) of the Companies Act, 1956 so repealed under section 465 of this Act;
- (v) such other institution as may be notified by the Central Government in consultation with the Reserve Bank of India:

Provided that no institution shall be so notified unless—

- (A) it has been established or constituted by or under any Central or State Act; or
- (B) not less than fifty-one per cent of the paid-up share capital is held or controlled by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments.

1.4 Conversion of Public Company into a Private Company or Vice versa

(i) **Conversion of public company into private company-** A public company can be converted into a private company by passing a special resolution, alters its articles so as to include therein the restrictions contained in Section 2(68) of the Act. A special resolution passed to convert a public company into a private company is binding on dissenting shareholders provided it is *bona fide*, is in the interest of the company as a whole, and is consistent with the objects in the memorandum of association [*Bal Ramba vs. Master Silk Mills AIR 1955 N.U.R. Saurashtra 927*]. *Under Section 14(1), any alteration made in the articles to convert a public company into a private company shall take effect only with the approval of the Tribunal which shall make such order as it deems fit. [* This proviso contained under the section 14(1) of the Companies Act, 2013 , is yet to be notified]

(ii) **Conversion of private company into public company-** Similarly where a private company alters its articles by passing special resolution in such a manner that they no longer includes the restrictions and limitations which are required to be included in the articles of a private company, then such company shall cease to be a private company from the date of such alteration.

Filing with the registrar: Every alteration of the articles and a copy of the order of the Tribunal approving the alteration shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.

Any alteration of the articles registered as above shall, subject to the provisions of this Act, be valid as if it were originally in the articles.

1.5 When Companies must be registered?

According to section 464 of the Companies Act, 2013, no association or partnership consisting of more than such number of persons (i.e. not exceeding 100) shall be, formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under this Act or is formed under any other law for the time being in force:

Above stated provision shall not apply to—

- (a) a Hindu undivided family carrying on any business; or
- (b) an association or partnership, if it is formed by professionals who are governed by special Acts.

Every member of an association or partnership carrying on business in contravention of above law, shall be punishable with fine which may extend to one lakh rupees and shall also be personally liable for all liabilities incurred in such business.

Where an association is formed, which has membership in excess of the number aforementioned, will be an illegal association. Such a body will have no legal existence and it cannot be wound up under the Act, or even as an unregistered company. Neither a member of it would be able to sue it, nor would it be able to sue the member. Nevertheless, a member who has paid any money to the association would be able to recover it from the director or agents or the association before the money so paid has been applied to an illegal purpose [*Greeberg vs. Cooperstein* [1965] Ch. 657 followed in *Ram Das vs. Kunut Dhari* AIR 1925]. Every person who is, or continues to be a member of an association in the circumstance described above, is personally culpable for all liabilities incurred in such business and every member is in addition punishable for any person or persons to trade or carry on business under any name or title of which 'limited' is the last word, without being fully incorporated.

The purpose of prohibiting formation of large unincorporated business association is to "prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies so that persons dealing with them did not know with whom they were contracting and so might be put to great difficulty and expenses" [*Smith vs. Anderson* [1980] 15 Ch. D 247].

Illegality or invalidity in the constitution of an association does not affect its liability to tax or its chargeability as a unit of assessment [*Kumarswamy Chettiar vs. ITO* [1957] ITR 457].

1.6 Mode of Registration/Incorporation of Company

(i) **Formation of company:** Section 3 of the Companies Act, 2013 deals with the basic requirement with respect to the constitution of the company. In the case of a public company with or without limited liability any 7 or more persons can form a company for any lawful purpose by subscribing their names to memorandum and complying with the requirements of this Act in respect of registration. In exactly the same way, 2 or more persons can form a

private company and one person where company to be formed is one person company. Persons who form the company are known as promoters. It is they who conceive the idea of forming the company. They take all necessary steps for its registration.

One person company(OPC): Law with respect to formation of OPC provides that –

- The memorandum of OPC shall indicate the name of the other person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company.
- The other person whose name is given in the memorandum shall give his prior written consent in prescribed form and the same shall be filed with Registrar of companies at the time of incorporation.
- Such other person may be given the right to withdraw his consent
- The member of OPC may at any time change the name of such other person by giving notice to the company and the company shall intimate the same to the Registrar
- Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.
- Only a natural person who is an Indian citizen and resident in India (person who has stayed in India for a period of not less than 182 days during the immediately preceding one calendar year)-
 - shall be eligible to incorporate a OPC;
 - shall be a nominee for the sole member of a OPC.
- No person shall be eligible to incorporate more than one OPC or become nominee in more than one such company.
- No minor shall become member or nominee of the OPC or can hold share with beneficial interest.
- Such Company cannot be incorporated or converted into a company under section 8 of the Act. Though it may be converted to private or public companies in certain cases. The procedure of conversion is given in the rules 6 & 7 of the Chapter II.
- Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of anybody corporate.
- OPC cannot convert voluntarily into any kind of company unless two years have expired from the date of incorporation, except where the paid up share capital is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.
- If One Person Company or any officer of such company contravenes the provisions, they shall be punishable with fine which may extend to ten thousand rupees and with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.

(ii) **Incorporation of company:** This section 7 of the Companies Act, 2013 provides for the procedure to be followed for incorporation of a company.

(1) **Filing of the documents and information with the registrar:** For the registration of the company following documents and information are required to be filed with the registrar within whose jurisdiction the registered office of the company is proposed to be situated-

- the memorandum and articles of the company duly **signed by all the subscribers** to the memorandum.
- a **declaration by person who is engaged in the formation of the company** (an advocate, a chartered accountant, cost accountant or company secretary in practice), **and by a person named in the articles** (director, manager or secretary of the company), that all the requirements of this Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with.
- an **affidavit from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles** stating that-
 - ◆ he is not convicted of any offence in connection with the promotion, formation or management of any company, or
 - ◆ he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the last five years,
 - ◆ and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief;
- the **address for correspondence** till its registered office is established;
- the **particulars** (names, including surnames or family names, residential address, nationality) **of every subscriber** to the memorandum along with proof of identity, and in the case of a subscriber being a body corporate, such particulars as may be prescribed.
- the **particulars** (names, including surnames or family names, the Director Identification Number, residential address, nationality) **of the persons mentioned in the articles as the first directors** of the company and such other particulars including proof of identity as may be prescribed; and
- the **particulars of the interests of the persons mentioned in the articles** as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed.

Particulars provided in this provision shall be of the individual subscriber and not of the professional engaged in the incorporation of the company [The Companies (**Incorporation**) Rules, 2014].

(2) **Issue of certificate of incorporation on registration:** The Registrar on the basis of documents and information filed, shall register all the documents and information in the

register and issue a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act.

(3) **Allotment of corporate identity number (CIN):** On and from the date mentioned in the certificate of incorporation, the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.

(4) **Maintenance of copies of all documents and information:** The company shall maintain and preserve at its registered office copies of all documents and information as originally filed, till its dissolution under this Act.

(5) **Furnishing of false or incorrect information or suppression of material fact:** If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action under section 447.

(6) **Company incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact :** where, at any time after the incorporation of a company, it is proved that the company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making declaration under this section shall each be liable for action under section 447.

(7) ***Order of the Tribunal:** where a company has been got incorporated by furnishing false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants,—

- (a) pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or
- (b) direct that liability of the members shall be unlimited; or
- (c) direct removal of the name of the company from the register of companies; or
- (d) pass an order for the winding up of the company; or
- (e) pass such other orders as it may deem fit:

Provided that before making any order,—

- the company shall be given a reasonable opportunity of being heard in the matter; and

- the Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.

[* This provision contained under the sub-section (7) is yet to be notified]

(iii) Effect of registration: Section 9 of the Companies Act, 2013 provides for the effect of registration of a company.

According to the provision from the date of incorporation (mentioned in the certificate of incorporation), the subscribers to the memorandum and all other persons, who may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum. Such a registered Company shall be capable of exercising all the functions of an incorporated company under this Act and having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name.

From the date of incorporation mentioned in the certificate, the company becomes a legal person separate from the incorporators; and there comes into existence a binding contract between the company and its members as evidenced by the Memorandum and Articles of Association [*Hari Nagar Sugar Mills Ltd. vs. S.S. Jhunjhunwala AIR 1961 SC 1669*]. It has perpetual existence until it is dissolved by liquidation or struck out of the register, and has the common seal. A shareholder who buys shares, does not buy any interest in the property of the company but in certain cases a writ petition will be maintainable by a company or its shareholders.

A legal personality emerges from the moment of registration of a company and from that moment the persons subscribing to the Memorandum of Association and other persons joining as members are regarded as a body corporate or a corporation in aggregate and the legal person begins to function as an entity. A company on registration acquires a separate existence and the law recognises it as a legal person separate and distinct from its members [*State Trading Corporation of India vs. Commercial Tax Officer AIR 1963 SC 1811*].

It may be noted that under the provisions of the Act, a company may purchase shares of another company and thus become a controlling company. However, merely because a company purchases all shares of another company it will not serve as a means of putting an end to the corporate character of another company and each company is a separate juristic entity [*Spencer & Co. Ltd. Madras vs. CWT Madras [1969] 39 Comp. Case 212*].

As has been stated above, the law recognizes such a company as a juristic person separate and distinct from its members. The mere fact that the entire share capital has been contributed by the Central Government and all its shares are held by the President of India and other officers of the Central Government does not make any difference in the position of registered company and it does not make a company an agent either of the President or the Central Government [*Heavy Electrical Union vs. State of Bihar AIR 1970 SC 82*].

(iv) Effect of Memorandum and Articles: As per section 10 of the Companies Act, 2013,

where the memorandum and articles when registered, shall bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and an agreement to observe all the provisions of the memorandum and of the articles. All monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

As a result, a number of legal relationships are formed between different parties and the company which are described below:

- (a) *Between the members and company:* The memorandum and articles constitute a contract between the members and the company. In consequence, the members are bound to the company under a statutory covenant. For instance, it has been held in *Bradford Banking Co. vs. Briggs* that where the articles give the company a lien upon each share for debts due by shareholders to the company, and where a shareholder mortgages his shares and the mortgagee serves notice thereof upon the company, the mortgagee would have priority over the company, only if the shareholder had incurred a liability to the company after the notice of the mortgage was given to the company. If, on the other hand, the shareholder had incurred a liability before the notice of mortgage was given to the company, the company would have the priority.
- (b) *Between the company and the members:* Views differ on the questions as to whether and how far the memorandum and articles bind the company to the members. One view is that it is bound just as its members are. Another view is that the company is not wholly bound. But it seems that courts, instead of conforming to either of these views, have elected to take a via media. It is not true to say that the company is wholly bound so that any member can enforce any articles against it. But it is bound to the extent that any member can sue it so as to prevent any breach of the article which is likely to affect his right as a member of the company [*Hickman vs. Kent Sheepbreeder's Association* [1985] 1 Ch. 887]. Thus an individual member can file a suit against the company to enforce his individual rights, e.g. right to contest election for directorship of the company, right to get back his shares wrongfully forfeited, right to receive a share certificate, share warrants to bearer or notice of general meetings etc. [*Pender vs. Lushington* [1817] 7 Ch. D. 70; *Nagaffa vs. Madras Race Club*, AIR 1951 Mad. 83 C.L. *Joseph vs. Los* AIR 1965 (Ker.) 68]. The member suing in such cases "sues not in the rights of a member but in his own right to protect from invasion of his own individual right as a member" [*Per Jenkis L.J. in Edwards vs. Halliwell* [1950] 2 All ER 1964 at p. 1067].
- (c) *Between member inter se:* In the case of *Wood vs. Odessa Water Works Co.* [1989] 42 Ch. D. 363, *Sterling J. Observed:* The articles of Association constitute a contract not merely between the shareholders and the company but between each individual shareholder and every other.

The foregoing principle had been further clarified by the decision in another English case of *Welton vs. Saffary* [1897] A.C. 315. In this case, the learned Judge observed that "It is quite true that the articles constitute a contract between each members of the company

but the articles do not, any the less in my opinion, regulate the right *inter se*. Such rights can only be enforced by or against a member through the company or by the liquidator representing the company, but no member has as between himself and another member any right beyond that which the contract with the company gives him”.

This proposition is not free from controversy because of the conflict of judicial opinions; in fact, until the decision in *Rayfide vs. Hands* [1960] Ch. 1, weightage of judicial opinion was against a member being bound to other member. In this case, the articles of a private company provided that “every member who intends to transfer shares shall inform the directors who will take the said shares equally between them at a fair value. “It was held that articles bound the directors as members to do so and that this obligation was a personal one, which could be forced against them by other members directly, without joining the company as a party. Obviously, the Court was influenced by the fact that the company was private company, which “bears a close analogy to partnerships”.

- (d) *Between the company and the outsiders*: The memorandum and the articles do not constitute a contract between the company and outsiders. Neither the company nor the members are bound by the articles to outsiders, since these constitute a contract between members, *inter se*, and the outsider is not a party to the articles although he may be named therein.

Nonetheless, an outsider is entitled to assume that in respect of contract entered into with him all the formalities required to be carried out under the articles or memorandum have been duly complied with [*Royal British Bank vs. Turquand* [1956] 6 E.B. 327].

- (v) **Commencement of business, etc** : (1) Section 11 of the Companies Act, 2013 seeks to provide that a company having a share capital shall not commence any business or exercise any borrowing powers unless—

- (a) a declaration is filed by a director with the Registrar stating that –
- ◆ every subscriber to the memorandum has paid the value of the shares agreed to be taken by him, and
 - ◆ the paid-up share capital of the company is not less than 5 lakh rupees in case of a public company and not less than 1 lakh rupees in case of a private company on the date of making of this declaration; and
- (b) the company has filed with the Registrar a verification of its registered office
- (2) If any **default** is made in complying with the requirements of this section:
- ◆ The company - liable to a penalty which may extend to five thousand rupees, and
 - ◆ Every officer who is in default - punishable with fine which may extend to one thousand rupees for every day during which the default continues.
- (3) Where **no declaration has been filed with the Registrar** within 180 days of the date of incorporation of the company and the Registrar has reasonable cause to believe that the

company is not carrying on any business or operations, he may along with the penalties/punishment, initiate action for the removal of the name of the company from the register of companies under Chapter XVIII (Removal of names of companies from the register of companies).

Vide Notification S.O. 1352(E) dated 21.05.2014 in exercise of powers conferred by Section 458 of the Companies Act, 2013 & in supersession of the notification of the Government of India, MCA, dated the 10.07.2012 published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-Section (ii) vide no. S.O. 1539(E), dated 10.07.2012, in so far as it relates to items (a) to (f) & items (n), except as respect things done or omitted to be done before such supersession, the Central Govt. hereby delegates to the RD at Mumbai, Kolkata, Chennai, Noida, Ahmedabad, Hyderabad & Shillong, the power & functions vested in it under the following sections of the said Act, subject to the condition that the Central Govt. may revoke such delegation of powers or may itself exercise the powers & functions under this section [i.e.11(3)], if in its opinion, such course of action is necessary in the public interest.

(vi) Registered office of a company: Section 12 of the Companies Act, 2013 seeks to provide for the registered office of the companies for the communication and serving of necessary documents, notices letters etc. The domicile and the nationality of a company is determined by the place of its registered officer. This is also important for determining the jurisdiction of the court.

- (1) Registered office:** From the 15th day of its incorporation and at all times thereafter a company shall have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it.
- (2) Verification of registered office:** The company shall furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation .
- (3) Labeling of company:** Every company shall—
 - ◆ paint or affix its name, and the address of its registered office, and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in legible letters, and if the characters employed are not those of the language/s in general use in that locality, then also in the characters of that language/s.
 - ◆ have its name engraved in legible characters on its seal;
 - ◆ get its name, address of its registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications; and
 - ◆ have its name printed on hundies, promissory notes, bills of exchange and such other documents as may be prescribed:

- (4) **Name change by the company:** Where a company has changed its name/s during the last two years, it shall paint or affix or print, along with its name, the former name or names so changed during the last two years.
- (5) **In case of OPC:** The words “One Person Company” shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.
- (6) **Notice of change to registrar:** Notice of every change of the situation of the registered office, verified in the manner prescribed, after the date of incorporation of the company, shall be given to the Registrar within 15 days of the change, who shall record the same.
- (7) **Change by passing of special resolution:** The registered office of the company shall be changed only by passing of special resolution by a company—
 - ◆ in the case of an existing company, outside the local limits of any city, town or village where such office is situated at the commencement of this Act or where it may be situated later by virtue of a special resolution passed by the company; and
 - ◆ in the case of any other company, outside the local limits of any city, town or village where such office is first situated or where it may be situated later by virtue of a special resolution passed by the company:
- (8) **Change of registered office outside the jurisdiction of registrar:** Where a company changes the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State, there such change is to confirmed by the Regional Director on an application made by the company.
- (9) **Communication and filing of confirmation:** The confirmation of change of registered office from jurisdiction of one registrar to another registrar within the same state, shall be—
 - ◆ communicated within 30 days from the date of receipt of application by the Regional Director to the company, and
 - ◆ the company shall file the confirmation with the Registrar within a period of 60 days of the date of confirmation who shall register the same, and
 - ◆ certify the registration within a period of thirty days from the date of filing of such confirmation.
- (10) **Certificate, a conclusive evidence of compliance of requirements of this Act:** The certificate shall be conclusive evidence that all the requirements of this Act with respect to change of registered office have been complied with and the change shall take effect from the date of the certificate.
- (11) **In case of default:** If any default is made in complying with the requirements of this section, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every day during which the default continues but not exceeding one lakh rupees.

(vii) Act to override memorandum, articles, etc.

According to section 6 of the Companies Act, 2013, the provisions of this Act shall have overriding effect on provisions contained in memorandum or articles or in an agreement or in resolution passed by the company in the general meeting or by its board of directors, whether they are registered, executed or passed before or after the commencement of this Act.

Any provision contained in any of the above mentioned document, shall be void, to the extent to which it is inconsistent to the provisions of this Act.

1.7 Memorandum of Association

The Memorandum of Association of company is in fact its charter; it defines its constitution and the scope of the powers of the company with which it has been established under the Act. It is the very foundation on which the whole edifice of the company is built.

“Fundamentally, there are two objects in registering the memorandum. First, that the intending corporator who contemplates the investment of his capital may know within what fields it will be incurring risks. Secondly, that anyone dealing with the company may know without reasonable doubt whether the contractual relationship which he is proposing to enter into with the company is one relating to matters within its corporate objects”. A company cannot depart from the provisions contained in the memorandum however imperative may be the necessity for the departure. It cannot enter into a contract or engage in any trade or business, which is beyond the power conferred on it by the memorandum. If it does so, it would be *ultra vires* the company and void. A memorandum is a public document under Section 399 of the Companies Act, 2013. Consequently, every person entering into a contract with the company is presumed to have the knowledge of the conditions contained therein.

Section 4 of the Companies Act, 2013 seeks to provide for the requirements with respect to memorandum of a company.

- (i) **Content of the memorandum:** The memorandum of a company shall state—
 - (a) the **name of the company** with the last word “Limited” in the case of a public limited company, or the last words “Private Limited” in the case of a private limited company. This clause is not applicable on the companies formed under section 8 of the Act.
 The name including phrase ‘Electoral Trust’ may be allowed for Registration of companies to be formed under section 8 of the Act, in accordance with the Electoral Trusts Scheme, 2013 notified by the Central Board of Direct Taxes (CBDT). For the Companies under section 8 of the Act, the name shall include the words foundation, Forum, Association, Federation, Chambers, Confederation, council, Electoral trust and the like etc. [The Companies (Incorporation) Rules, 2014]
 - (b) the State in which the **registered office of the company** is to be situated;
 - (c) the **objects** for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof;

If any company has changed its activities which are not reflected in its name, it shall change its name in line with its activities within a period of six months from the change of activities after complying with all the provisions as applicable to change of name.

- (d) the **liability of members** of the company, whether limited or unlimited, and also state,—
 - ◆ **in the case of a company limited by shares**, that the liability of its members is limited to the amount unpaid, if any, on the shares held by them; and
 - ◆ **in the case of a company limited by guarantee**, the amount up to which each member undertakes to contribute—
 - to the **assets of the company in the event of its being wound-up** while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and
 - to the **costs, charges and expenses of winding-up** and for adjustment of the rights of the contributories among themselves;
- (e) in the case of a company having a share capital,—
 - ◆ the **amount of share capital with which the company is to be registered** and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share; and
 - ◆ the **number of shares each subscriber to the memorandum intends to take**, indicated opposite his name;
- (f) **in the case of OPC**, the name of the person who, in the event of death of the subscriber, shall become the member of the company.
- (ii) **Applying for the name of the company**: The name stated in the memorandum shall not—
 - (a) be **identical with or resemble too nearly** to the name of an existing company registered under this Act or any previous company law; or
 - (b) be such that **its use by the company**—
 - ◆ will constitute an offence under any law for the time being in force; or
 - ◆ is **undesirable** in the opinion of the Central Government.

As per the Notification S.O. 1353(E), dated 9th Of July, 2014. In exercise of powers conferred by Section 458 of the Companies Act, 2013 & in supersession of the notification of the Government of India, MCA, dated the 10.07.2012 published in the Gazette of India, Extraordinary, Part-II, Sec-3, sub-sec (ii) vide no. S.O. 1538(E), dated 10.07.2012, in so far as it relates to items (a) to (b) & items (d) to (e), except as respect things done or omitted to be done before such supersession, the

Central Government. hereby delegates to the ROC the power & functions vested in it under the this section[i.e. section 4(2)] of the said Act, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers & functions under the said sections, if in its opinion, such course of action is necessary in the public interest.

(iii) **Registration of name of the company:** Without effecting the above provisions, a company shall not be registered with a name which contains—

- any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force; or
- such word or expression, as may be prescribed, unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

Vide General Circular No. 02/2014, dated 11.02.2014 a clarification was issued on the use of word 'National' in the names of Companies or LLP. According to which no company should be allowed to be registered with the word 'National' as part of its title unless it is a government company & the Central/State govt. has a stake in it.

Similarly, the word 'Bank' may be allowed in the name of an entity only when such entity produces a 'No Objection Certificate' or 'Exchange' should be allowed in the name of a company only where 'No Objection Certificate' from SEBI in this regard is produced by the Promoters.

(iv) **Requirement for the reservation of the name of the company:** (a) A person may make an application, in such form and manner and accompanied by such fee, as may be prescribed, to the Registrar for the reservation of a name set out in the application as—

- the name of the proposed company; or
- the name to which the company proposes to change its name.

(b) Upon receipt of an application under sub-section (4), the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of sixty days from the date of the application.

(c) Where after reservation of name it is found that name was applied by furnishing wrong or incorrect information, then,—

- if the company has not been incorporated, the reserved name shall be cancelled and the person making application shall be liable to a penalty extending to one lakh rupees;
- if the company has been incorporated, the Registrar may, after giving the company an opportunity of being heard—
 - ◆ either direct the company to change its name within a period of three months, after passing an ordinary resolution;

- ◆ take action for striking off the name of the company from the register of companies; or
- ◆ make a petition for winding up of the company.

As per the General Circular No.29/2014, dated 11th of July, 2014, Government hereby directed that while allotting names to Companies/Limited Liability Partnerships, the Registrar of Companies concerned should exercise due care to ensure that the names are not in contravention of the provisions of the Emblems and Names (Prevention of Improper Use) Act, 1950. It is necessary that Registrars are fully familiar with the provisions of the said Act.

(v) **Forms and schedule related to memorandum:** The memorandum of a company shall be in respective forms specified in Tables A, B, C, D and E in Schedule I as may be applicable to such company.

(vi) Any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, shall not give any person a right to participate in the divisible profits of the company otherwise than as a member. If the contrary is done, it shall be void.

Doctrine of ultra vires: The meaning of the term *ultra vires* is simply "beyond (their) powers". The legal phrase "*ultra vires*" is applicable only to acts done in excess of the legal powers of the doers. This presupposes that the powers are in their nature limited. To an ordinary citizen, the law permits whatever the law does not expressly forbid. It is only when the law has called into existence a person for a particular purpose or has recognised its existence - such as in the case of a limited company - that the power is limited to the authority delegated expressly or by implication and to the objects for which it was created. In the case of such a creation, the ordinary law applicable to an individual is somewhat reversed, whatever is not permitted expressly or by implication, by the constituting instrument, is prohibited not by any express prohibition of the legislature, but by the doctrine of *ultra vires*.

It is a fundamental rule of Company Law that the objects of a company as stated in its memorandum can be departed from only to the extent permitted by the Act - thus far and no further [*Ashbury Railway Company Ltd. vs. Riche*]. In consequence, any act done or a contract made by the company which travels beyond the powers not only of the directors but also of the company is wholly void and inoperative in law and is therefore not binding on the company. On this account, a company can be restrained from employing its fund for purposes other than those sanctioned by the memorandum. Likewise, it can be restrained from carrying on a trade different from the one it is authorised to carry on.

The impact of the doctrine of *ultra vires* is that a company can neither be sued on an *ultra vires* transaction, nor can it sue on it. Since the memorandum is a "public document", it is open to public inspection. Therefore, when one deals with a company one is deemed to know about the powers of the company. If in spite of this you enter into a transaction which is *ultra vires* the company, you cannot enforce it against the company. For example, if you have

supplied goods or performed service on such a contract or lent money, you cannot obtain payment or recover the money lent. But if the money advanced to the company has not been expended, the lender may stop the company from parting with it by means of an injunction; this is because the company does not become the owner of the money, which is *ultra vires* the company. As the lender remains the owner, he can take back the property *in specie*. If the *ultra vires* loan has been utilised in meeting lawful debt of the company then the lender steps into the shoes of the debtor paid off and consequently he would be entitled to recover his loan to that extent from the company.

An act which is *ultra vires* the company being void, cannot be ratified by the shareholders of the company. Sometimes, act which is *ultra vires* can be regularised by ratifying it subsequently. For instance, if the act is *ultra vires* the power of the directors, the shareholders can ratify it; if it is *ultra vires* the articles of the company, the company can alter the articles; if the act is within the power of the company but is done irregularly, shareholder can validate it.

1.8 Alteration of the Memorandum

(i) **Procedure of alteration of memorandum:** Section 13 of the Companies Act, 2013 provides the provisions that deal with the alteration of the memorandum. The provision says that-

- (1) **Alteration by special resolution:** Company may alter the provisions of its memorandum with the approval of the members by a special resolution.
- (2) **Name change of the company:** Any change in the name of a company shall be effected only with the approval of the Central Government in writing:

As per the Notification S.O. 1353(E), dated 9th Of July, 2014. In exercise of powers conferred by Section 458 of the Companies Act, 2013 & in supersession of the notification of the Government of India, MCA, dated the 10.07.2012 published in the Gazette of India, Extraordinary, Part-II, Sec-3, sub-sec (ii) vide no. S.O. 1538(E), dated 10.07.2012, in so far as it relates to items (a) to (b) & items (d) to (e), except as respect things done or omitted to be done before such supersession, the Central Government. hereby delegates to the ROC the power & functions vested in it under the this section [i.e. section 13(2)] of the said Act, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers & functions under the said sections, if in its opinion, such course of action is necessary in the public interest.

However, no such approval shall be necessary where the change in the name of the company is only the deletion therefrom, or addition thereto, of the word "Private", on the conversion of any one class of companies to another class.

The change of name shall not be allowed to a company which has defaulted in filing its annual returns or financial statements or any document due for filing with the Registrar or

which has defaulted in repayment of matured deposits or debentures or interest on deposits or debentures.

[The Companies (Incorporation) Rules, 2014]

- (3) **Entry in register of companies:** On any change in the name of a company, the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name and the change in the name shall be complete and effective only on the issue of such a certificate.
- (4) **Change in the registered office:** The alteration of the memorandum relating to the place of the registered office from one State to another shall not have any effect unless it is approved by the Central Government on an application in such form and manner as may be prescribed.
- (5) **Dispose of the application of change of place of the registered office:** The Central Government shall dispose of the application of change of place of the registered office within a period of sixty days.

Before passing of order, Central Government may satisfy itself that-

- ◆ the alteration has the consent of the creditors, debenture-holders and other persons concerned with the company, or
- ◆ the sufficient provision has been made by the company either for the due discharge of all its debts and obligations, or
- ◆ adequate security has been provided for such discharge.

Vide Notification S.O. 1352(E) dated 21.05.2014 in exercise of powers conferred by Section 458 of the Companies Act, 2013 & in supersession of the notification of the Government of India, MCA, dated the 10.07.2012 published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-Section (ii) vide no. S.O. 1539(E), dated 10.07.2012, in so far as it relates to items (a) to (f) & items (n), except as respect things done or omitted to be done before such supersession, the Central Govt. hereby delegates to the RD at Mumbai, Kolkata, Chennai, Noida, Ahmedabad, Hyderabad & Shillong, the power & functions vested in it under the following sections of the said Act, subject to the condition that the Central Govt. may revoke such delegation of powers or may itself exercise the powers & functions under this section [i.e. 13 (4) & (5)], if in its opinion, such course of action is necessary in the public interest :-

- (6) **Filing with Registrar:** A company shall, in relation to any alteration of its memorandum, file with the Registrar—
 - ◆ the special resolution passed by the company under sub-section (1);
 - ◆ the approval of the Central Government under sub-section (2), if the alteration involves any change in the name of the company.

- (7) **Filing of the certified copy of the order with the registrar of the states:** Where an alteration of the memorandum results in the transfer of the registered office of a company from one State to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States within such time and in such manner as may be prescribed, who shall register the same.
- (8) **Issue of fresh certificate of incorporation:** The Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration.
- (9) **Change in the object of the company:** A company, which has raised money from public through prospectus and still has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution through postal ballot is passed by the company and—
- ◆ the details, in respect of such resolution shall also be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;
 - ◆ the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board.
- (10) **Registrar to certify the registration on the alteration of the objects:** The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution.
- (11) **Alteration to be registered:** No alteration made under this section shall have any effect until it has been registered in accordance with the provisions of this section.
- (12) **Only member have a right to participate in the divisible profits of the company:** Any alteration of the memorandum, in the case of a company limited by guarantee and not having a share capital, intending to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.
- (ii) **Rectification of name of memorandum:** (1) **Central government to issue direction:** According to section 16 of the Companies Act, 2013, the Central Government is empowered to give direction to the company to rectify its name (Where the name is identical with or too nearly resembles the name by which a company in existence had been previously registered, or the name is identical with or too nearly resembling to a registered trade mark) within a period of 3 months or 6 months, as the case may be, from the issue of such direction by passing an ordinary resolution.
- (2) **Notice of change to the registrar:** Where a company changes its name or obtains a new name, it shall within a period of 15 days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out

necessary changes in the certificate of incorporation and the memorandum.

(3) **Default in compliance with the direction:** If a company makes default in complying with any direction-

Liabe person	Penalty/punishment
Company	Fine of 1,000 rupees for every day during which the default continues
Every Officer who is in default	Fine varying from 5,000 rupees to 1 lakh rupees.

Vide Notification S.O. 1352(E) dated 21.05.2014 in exercise of powers conferred by Section 458 of the Companies Act, 2013 & in supersession of the notification of the Government of India, MCA, dated the 10.07.2012 published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-Section (ii) vide no. S.O. 1539(E), dated 10.07.2012, in so far as it relates to items (a) to (f) & items (n), except as respect things done or omitted to be done before such supersession, the Central Govt. hereby delegates to the RD at Mumbai, Kolkata, Chennai, Noida, Ahmedabad, Hyderabad & Shillong, the power & functions vested in it under the following sections of the said Act, subject to the condition that the Central Govt. may revoke such delegation of powers or may itself exercise the powers & functions under this section [i.e.16], if in its opinion, such course of action is necessary in the public interest,:-

1.9 Articles of Association

The articles of association of a company are its rules and regulations, which are framed to manage its internal affairs. Just as the memorandum contains the fundamental conditions upon which along the company is allowed to be incorporated, so also the articles are the internal regulations of the company (*Guinness vs. Land Corporation of Ireland* 22 Ch. D. 349, 381). These general functions of the articles have been aptly summed up by Lord Cairns in *Ashbury Carriage Co. vs. Riche* as follows: "The articles play a part subsidiary to memorandum of association. They accept the memorandum as the charter of incorporation, and so accepting it the articles proceed to define the duties, the rights and powers of the governing body as between themselves and the company and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulation of the company may from time to time be made."

The document containing the articles of association of a company (the Magna Carta) is a business document; hence it has to be construed strictly. It regulates domestic management of a company and creates certain rights and obligations between the members and the company [*S.S. Rajkumar vs. Perfect Castings (P.) Ltd.* [1968] 38 *Camp. Case* 187].

The articles of association are in fact the bye-laws of the company according to which director and other officers are required to perform their functions as regards the management of the company, its accounts and audit. It is important therefore that the auditor should study them

and, while doing so he should note the provisions therein in respect of relevant matters.

Section 5 of the Companies Act, 2013 seeks to provide the contents and model of articles of association. The section lays the following law-

- (1) **Contains regulations:** The articles of a company shall contain the regulations for management of the company.
- (2) **Inclusion of matters:** The articles shall also contain such matters, as are prescribed under the rules. However, a company may also include such additional matters in its articles as may be considered necessary for its management.
- (3) **Contain provisions for entrenchment:** The articles may contain provisions for entrenchment (to protect something) to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution, are met or complied with.
- (4) **Manner of inclusion of the entrenchment provision:** The provisions for entrenchment shall only be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.
- (5) **Notice to the registrar of the entrenchment provision:** Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed.
- (6) **Forms of articles:** The articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company.
- (7) **Model articles:** A company may adopt all or any of the regulations contained in the model articles applicable to such company.
- (8) **Company registered after the commencement of this Act:** In case of any company, which is registered after the commencement of this Act, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company.
- (9) **Section not apply on company registered under any previous company law:** Nothing in this section shall apply to the articles of a company registered under any previous company law, unless amended under this Act.

1.10 Alteration of Articles

Section 14 of the Companies Act, 2013, vests companies with power to alter or add to its articles. A company cannot divest itself of these powers [*Andrews vs. Gas Meter Co.* [1897] 1 Ch. 161]. Matters as to which the memorandum is silent can be dealt with by the alteration of

article. Section 14 of the Companies Act, 2013 vests companies with power to alter or add to its articles. The law with respect to alteration of articles is as follows:

(1) Alteration by special resolution: Subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution alter its articles.

(2) Alteration to include conversion of companies: Alteration of articles include alterations having the effect of conversion of—

- (a) a private company into a public company; or
- (b) a public company into a private company:

Even where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, then such company shall, as from the date of such alteration, cease to be a private company:

However any such alteration having the effect of conversion of a public company into a private company, then such conversion shall not take effect except with the approval of the Tribunal and make such order as it may deem fit.

(3) Filing of alteration with the registrar: Every alteration of the articles and a copy of the order of the Tribunal approving the alteration, shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of **fifteen days** in such manner as may be prescribed, who shall register the same.

(4) Any alteration made shall be valid: Any alteration of the articles registered as above shall, subject to the provisions of this Act, be valid as if it were originally contained in the articles.

(5) Alteration noted in every copy: Every alteration made in articles of a company shall be noted in every copy of the articles, as the case may be. If a company makes any default in complying with the stated provisions, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every copy of the articles issued without such alteration.**[Section 15]**

Copies of memorandum, articles, etc., to be given to members:

According to section 17 every company on being so requested by a member, shall send copies of the following documents within seven days of the request on the payment of fees-

- (a) the memorandum;
- (b) the articles; and
- (c) every agreement and every resolution referred in section 117(Resolutions and agreements to be filed), if and in so far as they have not been embodied in the memorandum or articles.

In case of default, the company and every officer who is in default shall be liable for each

default, to a penalty of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

Doctrines of constructive notice and indoor management: In consequences of the registration of the memorandum and articles of association of the company with the Registrar of Companies, a person dealing with the company is deemed to have constructive notice of their contents. This is because these documents are construed as “public document” under Section 399 of the Companies Act, 2013. Accordingly if a person deals with a company in a manner incompatible with the provisions of the aforesaid documents or enters into transaction, which is *ultra vires* to these documents, he must do so at his peril. If someone supplies goods to a company in which it cannot deal according to its objects clause, he will not be able to recover the price from the company. Suppose the articles provide that a bill of exchange must be signed by two directors, if the bill is actually signed by one director only the holder thereof cannot claim payment thereon. However, the doctrine of constructive notice is not a positive one but a negative one like that of estoppel of which it forms parts. It operates only against the person who has been dealing with the company but not against the company itself; consequently he is prevented from alleging that he did not know that the constitution of the company rendered a particular act or a particular delegation of authority *ultra vires*. Thus, the doctrine is a “cloud” for the strangers.

1.11 Doctrine of Indoor Management

The aforesaid doctrine of constructive notice does in no sense mean that outsiders are deemed to have notice of the internal affairs of the company. For instance, if an act is authorised by the articles or memorandum, an outsider is entitled to assume that all the detailed formalities for doing that act have been observed. For example, the directors of R.B.B. Ltd. gave a bond to T. The articles empowered the directors to issue such bonds under the authority of a proper resolution. In fact, no such resolution was passed. Notwithstanding that, it was held that T could sue on the bonds on the ground that he was entitled to assume that the resolution had been duly passed [*The Royal British Bank vs. Turquand* [1956] 6E & B 327.] This is the doctrine of indoor management, popularly known as Turquand Rule, which is the only limitation to the doctrine of constructive notice discussed above.

Exceptions: Thus, you will have noticed that the aforementioned rule of Indoor Management is important to persons dealing with a company through its directors or other persons. They are entitled to assume that the acts of the directors or other officers of the company are validly performed, if they are within the scope of their apparent authority. So long as an act is valid under the articles, if done in a particular manner, an outsider dealing with the company is entitled to assume that it has been done in the manner required. The above mentioned doctrine of Indoor Management or Turquand Rule has limitations of its own. That is to say, it is inapplicable to the following cases, namely:

- (a) The rule does not protect any person when the person dealing with the company has notice, whether actual or constructive, of the irregularity [*Moris vs. Kenssen* (1946) A.C.

459; *Devi Ditta Mal vs. The Standard Bank of India* (1972) I.C. 568]. Thus director of a company cannot normally claim the benefit of the rule in the *Turquand Case* where he is also acting for the company in the transaction.

- (b) The doctrine in no way, rewards those who behave negligently. Where the person dealing with the company is put upon an inquiry, for example, where the transaction is unusual or not in the ordinary course of business. When a sole director and principal shareholder of a company paid into his own account with a bank a cheque drawn in favour of the company, the said bank was held to be put upon an enquiry and the bank could not rely upon the ostensible authority of the director [*Underwood vs. Bank of Liverpool* (1924) I.K.B. 775]. Likewise, a person who deals with a company may be put upon enquiry by reason of the unusual magnitude of the transactions having regard to the position of the agent who is acting for the company, [*Houghom & Co. vs. Nothard Lowe & Wills* (1917) 2 KB. 147, 149; *Rama Corporation Ltd. vs. Proved Tin & General Investments Ltd.* (1952) 2 K.B. 147, 152].

The company documents "are open to all who are minded to have any dealing whatsoever with the company and those deal with them just be affected with notice of all that is contained in those two documents. After that all that the directors do with reference to what it may call the indoor management of their own concern, is a thing to them only; subject to this observation, that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted (by the company's documents, namely memorandum or articles). When there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association then those dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company", says Lord Hatherly in *Mahony vs. East Holyford Mining Co.* [1875] L.R. 7 H.L. 869.

- (c) When an instrument purporting to be executed on behalf of the company is a forgery. The doctrine of indoor management applies only to irregularities which might otherwise affect a transaction but it cannot apply to forgery which must be regarded as nullity [*Ruben vs. Great Fingal Consolidated* (1966) A.C. 439; *Official Liquidator vs. Commr. of Police* (1969) I Comp. L.J. (Mad.)].

In view of the exceptions discussed above the rigidity of the doctrine of constructive notice is appreciably elastic. Therefore, if the doctrine of indoor management is at all a silver lining, it is only a slender silver lining of a rather dense cloud.

A critical examination of the statement that the memorandum and articles of association of a company cannot be altered except with the Tribunal permission: It would be evident from the under-mentioned discussion on the provisions of law that such blanket statement is not correct.

According to Section 13 of the Companies Act, 2013 the conditions in the memorandum of a company can be altered only in the cases, in the mode and to the extent for which express provision is made in the Act. For changing the place of registered office of the company from one State to another and its objects, a special resolution and the confirmation of the alteration

by the Central Government are necessary [Section 13], .The change of name by a company also requires a special resolution and the approval of the Central Government [Section 13]. Even for the alteration of the company's share capital in the shape of increasing, consolidating, sub-dividing, cancellation under section 61 specifically states that confirmation by the Tribunal *is required*. Only in the matter of reduction of share capital, confirmation by the Tribunal has been prescribed by Section 66.

In the matter of alteration of articles, Section 14 requires only a special resolution for the purpose, and if such resolution has the effect of converting a public company into a private company, the proviso thereto requires the approval of the Tribunal for its operation.

It is thus clear that the headline statement, unqualified as it is, cannot be said to be correct.

1.12 Conversion of companies already registered

According to Section 18 of the Companies Act, 2013, a company may convert itself in some other class of company by altering its memorandum and articles of association. Following is the law with respect to the conversion of the companies already registered.

1. **By alteration of memorandum and articles:** A company of any class registered under this Act may convert itself as a company of other class under this Act by alteration of memorandum and articles of the company in accordance with the provisions of this Chapter.
2. **File an application to the Registrar:** Wherever such conversion of companies is required to be done, the company shall file an application to the Registrar, who shall after satisfying himself that the provisions applicable for registration of companies have been complied with, close the former registration of the company.
3. **Issue a certificate of incorporation:** After registering the required documents, issue a certificate of incorporation in the same manner as its first registration.
4. **No effect on the debts, liabilities etc. incurred before conversion:** The registration of a company under this section shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by or on behalf of the company before conversion and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done.

1.13 Preliminary or Pre-Incorporation Contracts

Pre-incorporation contracts are those contracts, which are entered into, by agents or trustees on behalf of a prospective company before it has come into existence, *e.g.*, with the proprietor of a business to sell it to the prospective company. Since a company comes into existence from the date of its incorporation, it follows that any act purporting to be performed by it prior to that date is of no effect so far as the company is concerned. It will very likely be the intention of the promoters or persons concerned in the company that the company should, on its formation acquire some property or takeover the existing business, and for this purpose, a preliminary contract for the acquisition may be entered into before the company is formed. But

as the company is non-existent before incorporation it cannot be bound, by any purported ratification [*Kelner vs. Baxter (1862) L.R. 2 C.P. 174*].

The rules in respect of preliminary contracts may be summarised as follows:

- (a) The vendor cannot sue, or be sued by the company thereof, after its incorporation;
- (b) Person who acts for the intended company remains personally liable to the vendor even if the company purports to ratify the agreement, unless the agreement provides that:
 - (i) his liability shall cease if the company adopts the agreement; and
 - (ii) either party may rescind the agreement, if the company does not adopt it within a specified time;
- (c) After incorporation, the company may adopt the preliminary agreement. But this must be by novation which may be implied from the circumstances. But in some cases, the memorandum directs the directors to execute such contracts. The company can enforce a pre-incorporation contract if it is warranted by the terms of incorporation and for purposes of company.

A pre-incorporation contract can be enforced against the company if it is warranted by the terms of incorporation and it is adopted by the company and communicated in acceptance. [Sections 15 and 19 of the Specific Relief Act, 1963]. In such a case, the directors have no discretion in the matter.

1.14 Promoters

Persons who initiate promotion of a company are known as promoters. All persons who take steps for the registration of a company *e.g.*, those associated with the preparation of a prospectus or in drawing up the Memorandum of Association of the company and assisting in its registration are regarded as promoters. It should, however, be noted that persons acting only in a professional capacity *e.g.*, the solicitor, banker, accountant etc. are not regarded as promoters.

The Companies Act, 2013 defines the term "Promoter" under section 2(69) which means a person—

- (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
- (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

However, a person who is acting merely in a professional, shall not be regarded as promoter, *e.g.*, the solicitor, banker, accountant etc. are not regarded as promoters.

Any one who assists in the formation for a consideration payable if the company is floated, is a

promoter. "They are those who set in motion the machinery by which the Act enables them to create an incorporated company", [per Lord Blank burn in *Erlanger vs. Sambrero Phosphate & Co. (1893) 3 App. Case. 1218*].

(a) Promoter's duty to disclose: Until a company is incorporated, a promoter stands in a fiduciary capacity towards the company and its prospective shareholders. Hence, he must not make, either directly or indirectly or through a nominee etc., any profit out of his trust, unless the company after full disclosure of the facts, consents. In addition to his duty for declaration of secret profits, he must disclose to the company any interest he has in a transaction entered in to by it. Such disclosure is ineffective if made merely to directors who are nominees of the promoters. Disclosure may be made either to an independent board, or by means of a prospectus to the prospective shareholders. If the promoter makes a secret profit the company can rescind the contract or compel him to account for it. Where all the members of a private company are cognisant of the facts, the rule would not apply.

(b) Promoters as vendors: A promoter is entitled to sell his own property to the company provided he makes proper disclosure. This also applies to property which he acquires during the promotion and which he resells to the company. If he fails to make disclosure the company may either (a) rescind the contract, or (b) compel the promoter to surrender the profit.

(c) Promoter's remuneration: A promoter has no right to demand any remuneration from the company, for his promotional services in the absence of an express contract with the company. Indeed, in the absence of such a contract, he cannot even recover from the company payments he has made towards legal fees, stamp duties, registration fees, or other expenses in connection with the formation of the company.

1.15 Service of documents

Section 20 of the Companies Act, 2013, provides the mode in which documents may be served on the company, on the members and also on the registrars.

Law with respect to the service of documents is as follows-

(1) Serving of document to company: A document may be served on a company or an officer thereof by sending it to the company or the officer at the registered office of the company by-

- ◆ registered post, or
- ◆ speed post, or
- ◆ courier service, or
- ◆ leaving it at its registered office, or
- ◆ means of such electronic or other mode as may be prescribed:

However where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by **means of electronic or other mode**.

- (2) **Serving of document to registrar or member:** Save as provided in this Act or the rules made thereunder for filing of documents with the Registrar in electronic mode, a document may be served on Registrar or any member by sending it to him by-

- ◆ Post, or
- ◆ registered post, or
- ◆ speed post, or
- ◆ courier, or
- ◆ by delivering at his office or address, or
- ◆ by such electronic or other mode as may be prescribed:

However, a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting.

The term, "electronic transmission" means a communication that creates a record that is capable of retention, retrieval (recovery) and review, and which may thereafter be rendered into clearly legible tangible form. It may be made by-

- ◆ facsimile(duplicate) telecommunication or electronic mail, which the company or the officer has provided from time to time for sending communications,
- ◆ posting of an electronic message board or network that the company or the officer has designated for such communications, or
- ◆ other means of electronic communication, in respect of which the company or the officer has put in place reasonable systems to verify that the sender is the person contending to send the transmission

In case of delivery by post, such service shall be deemed to have been effected-

- (i) in the case of **a notice of a meeting**, at the expiration of forty eight hours after the letter containing the same is posted; and
- (ii) in **any other case**, at the time at which the letter would be delivered in the ordinary course of post. [The Companies **(Incorporation)** Rules, 2014]

Authentication of documents, proceedings and contracts

As per section 21 of the Companies Act, 2013, a document or proceeding requiring authentication by a company or contracts made by or on behalf of a company may be signed by –

- (i) any key managerial personnel, or
- (ii) an officer of the company duly authorised by the Board in this behalf.

UNIT 2- PROSPECTUS AND ALLOTMENT OF SECURITIES

Learning objectives

You might recall that from Unit 1 you have understood there are certain distinctions between a private and a public company. However, one aspect that you might have observed is that a private company is prohibited from access to the public in raising its capital. Contrast to this a public company shall have access to the public for raising the share capital. For doing so, it has to observe certain formalities like issue of prospectus, compliance of certain requirements in getting minimum subscription, share allotment etc. In this unit the following aspects of study are covered:

- ◆ Requirement for issue of prospectus
- ◆ Consequences in case of mis-statements in prospectus
- ◆ Allotment of shares
- ◆ Acceptance of deposits by companies
- ◆ Buy back of shares and the procedure
- ◆ Membership in a company

2.0 Introduction

This unit constitutes chapter III of the Act consisting of sections 23 to 42 dealing with the prospectus and allotment of securities. The Act provides the manner in which securities can be issued by both public and private company. This chapter relating to issue of securities is covered under two headings Part I relates to issue of public offer and Part II relates to issue of securities through private placement.

2.1 Prospectus – Meaning And Role

Section 2(70) of the Companies Act, 2013 defines "prospectus" as any document described or issued as a prospectus and includes a red herring prospectus (section 32), or shelf prospectus (section 31), or any notice, circular, advertisement or other document inviting offers from the public for the subscription, or purchase of any securities of a body corporate;

In this context, it should be noted that prospectus is not an offer in itself but an invitation to make an offer, signifying thereby that on acceptance of such an invitation by any member of the public, no binding contract between him and the company comes into being. Application for purchase of shares or debentures or for making a deposit constitutes an offer by the subscriber to the company and it is only on its acceptance by the company that a binding contract comes into existence.

The prospectus must be in writing. An oral invitation to subscribe for shares will not be considered prospectus. Television or film advertisement cannot be treated as prospectus.

The prospectus is the basic document on the basis of which the intending investors decide whether or not they should subscribe to the shares or debentures. Therefore, the law requires sufficient disclosure of various matters through prospectus and forbids variations of any terms and conditions of a contract contained therein except with the approval and authority of the company in general meeting by special resolution [Section 27 of the Companies Act, 2013].

“Those who issue prospectus holding out to the public great advantage which will accrue to persons who take up shares on the representations contained therein, are bound to state everything with scrupulous accuracy and not only to abstain from stating as fact that which is not so but to omit no fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privilege and advantages which the prospectus holds out as an inducement to take shares [as per *Kindersely V.C. in New Brunswick and Canada Railway & Land Co. vs. Muggeridge*].

It is therefore essential that the information statutorily needing disclosure is stated fully and precisely so that the investing public which is ignorant of the present and future prospects of the company may get all the information which is likely to affect the public mind. It is only to protect the members of the public against their being misguided by half truths or falsehoods that the law casts a liability on various persons connected with the issue of the prospectus to compensate every person (who subscribes on the faith of the prospectus) for any loss or damage he may have sustained because of the inclusion of any untrue statements in the prospectus [Section 35 of the Companies Act, 2013].

2.2 Issue of securities by the company

Section 23 of the Companies Act, 2013 is new section which seeks to provide the ways in which a public company or a private company may issue securities.

- (1) **Issue of securities by public company:** According to the section, a public company may issue securities in the following manner -
- (a) to public through prospectus (herein referred to as "public offer"), or
 - (b) through private placement; or
 - (c) through a rights issue or a bonus issue, and
 - (d) in case of a listed company or a company which intends to get its securities listed (unlisted companies), with the provisions of the Securities and Exchange Board of India Act, 1992 and the rules and regulations made there under.

Here term, "public offer" includes initial public offer (IPO) or further public offer of securities to the public by a company, or an offer for sale of securities to the public by an existing shareholder, through issue of a prospectus.

- (2) **Issue of securities by private company** Whereas a private company may issue securities —
- (a) by way of rights issue or bonus issue; or
 - (b) through private placement.

2.3 Power of Securities and Exchange Board to regulate issue and transfer of securities

This section 24 of the Companies Act, 2013 seeks to provide that issue and transfer of securities etc of the listed companies or companies which intend to get their securities listed, shall be administered by SEBI and the Central Government, as required. The section says that-

- (1) The provisions contained in this Chapter III (Prospectus and allotment), Chapter IV (share capital and debenture) and in section 127 (Punishment for failure to distribute dividends) shall-
 - (a) where the provisions relate to- (i) issue and transfer of securities; and (ii) non-payment of dividend, by listed companies or those companies which intend to get their securities listed on any recognised stock exchange in India, be administered by the Securities and Exchange Board by making regulations in this behalf;
 - (b) in any other case, be administered by the Central Government.

The sections further explains that all powers relating to all other matters with respect to prospectus, return of allotment, redemption of preference shares and any other matter specifically provided in this Act, shall be exercised by the Central Government, the Tribunal or the Registrar, as the case may be.

- (2) The Securities and Exchange Board shall, in respect of matters specified above and the matters delegated to it under proviso of section 458(1) [provisions relating to the forward dealing and the Insider trading], exercise the powers conferred upon it by the Securities and Exchange Board of India Act, 1992.

Whereas any difficulties have arisen regarding compliance with the provisions of section 24, section 58 and section 59 of the 2013 Act in so far as they relate to exercise of certain powers by the Tribunal, during the period the Tribunal is duly constituted under the 2013 Act; the Ministry of Corporate Affairs with respect to it issued an order called as, the Companies (Removal of Difficulties) Order, 2013 on 20th September, 2013.

By this order Ministry clarified that until a date is notified by the Central Government under section 434(1) of the Companies Act, 2013 for transfer of all matters, proceedings or cases to the Tribunal constituted under Chapter 28 of the Companies Act, 2013, till then, the Board of Company Law Administration shall exercise the powers of the Tribunal under sections 24, 58 and section 59 in pursuance of the second proviso to section 465(1) of the Companies Act, 2013.

2.4 Document containing offer of securities for sale to be deemed prospectus

Section 25 of the Companies Act, 2013 seeks to provide that any document by which the offer for sale of shares or debentures to the public is made shall for all purpose be treated as

prospectus issued by the company.

Act lays down the following provisions-

- (i) **Document by which offer for sale to the public is made:** According to the given provision where a company allots or agrees to allot any securities of the company to all or any of those securities being offered for sale to the public, then any document by which the offer for sale to the public is made- shall be deemed to be a prospectus issued by the company.
- (ii) **Contents of prospectus and the liability:** All enactments and rules of law as to the contents of prospectus and as to liability in respect of mis-statements, in and omissions from prospectus, or otherwise relating to prospectus, shall apply with the modifications [as specified in sub- sections (3) and (4)] and shall have effect as if the securities had been offered to the public for subscription and as if persons accepting the offer in respect of any securities were subscribers for those securities.

The liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof, remains same as that in the case of a prospectus.

- (iii) **Securities must be offered for sale to the public:** For the purposes of this Act, it shall be evident that an allotment of, or an agreement to allot, securities was made with a view to the securities being offered for sale to the public if it is shown—
 - (a) that an offer of the securities or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or
 - (b) that at the date when the offer was made, the whole consideration to be received by the company in respect of the securities had not been received by it.
- (iv) **Effect of application of section 26 on this section:** Section 26 relating to the matters stated in the prospectus, as applied by this section shall have effect, as if
 - (I) it required a prospectus to state in addition to the matters required by that section to be stated in a prospectus—
 - (a) the net amount of the consideration received or to be received by the company in respect of the securities to which the offer relates; and
 - (b) the time and place at which the contract where under the said securities have been or are to be allotted may be inspected;
 - (II) the persons making the offer were persons named in a prospectus as directors of a company.
- (v) **Person making an offer is a company or firm:** Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document, that is deemed to be prospectus, is signed on behalf of the company or firm by- (i) two

directors of the company, or (ii) by not less than one-half of the partners in the firm, as the case may be.

2.5 Matters to be stated in the Prospectus

Section 26 of the Companies Act, 2013 provides for the matters to be stated and the information to be given in the prospectus.

(1) **Contents of the prospectus:** Every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed and shall—

- (a) state the following **information**, namely:—
 - (i) **Names & addresses of registered office and the other persons** (like company secretary, Chief Financial Officer, auditors, legal advisers, bankers, trustees, underwriters and such other persons as prescribed under the rules).
 - (ii) **Dates of the opening and closing of the issue**, and declaration made by Board or the committee about the issue of allotment letters and refunds of the application money within the 15 days from the closure of the issue or such lesser time as may be specified by SEBI;
 - (iii) **A statement by the Board of Directors about the separate bank account** where all monies received out of the issue are to be transferred and disclosure of details of all monies (utilized /un-utilized) out of the previous issue in the prescribed manner;
 - (iv) **Details** (the names, addresses, telephone numbers, fax numbers and e-mail addresses) **of the underwriters and the amount underwritten by them**;
 - (v) **Consent** of directors, auditors, bankers to the issue, expert's opinion if any, and of such other persons, as prescribed under the rules;
 - (vi) Authority for the issue and the details of the resolution passed therefor;
 - (vii) Procedure and time schedule for allotment and issue of securities;
 - (viii) **Capital structure of the company** in the prescribed manner;
 - (ix) **Main objects of public offer**, terms of the present issue and such other particulars as may be prescribed;
 - (x) **Main objects and present business of the company** and its location, schedule of implementation of the project;
 - (xi) **Other particulars** relating to—
 - ◆ **management view of risk factors** specific to the project;
 - ◆ **gestation period** of the project;

- ◆ extent of progress made in the project;
 - ◆ deadlines for completion of the project; and
 - ◆ any litigation or legal action pending or taken by a Government Department or a statutory body during the last five years immediately preceding the year of the issue of prospectus against the promoter of the company;
- (xii) **Minimum subscription**, amount payable by way of premium, issue of shares otherwise than on cash;
- (xiii) **Details of directors** including their appointments and remuneration, and such particulars of the nature and extent of their interests in the company as may be prescribed; and
- (xiv) **Disclosures** of the sources of promoter's contribution; in such manner as may be prescribed;
- (b) set out the following reports for the purposes of the financial information, namely:—
- (i) **Reports by the auditors of the company** with respect to its profits and losses and assets and liabilities and such other matters as may be prescribed.
- (ii) **Reports relating to profits and losses for each of the five financial years** immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries and in such manner as may be prescribed:
- However where a company with respect to which a period of five years has not past from the date of incorporation – there such a prospectus shall set out the reports relating to profits and losses for each of the financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries;
- (iii) **reports made by the auditors** upon the profits and losses of the business of the company for each of the five financial years immediately preceding issue and assets and liabilities of its business on the last date to which the accounts of the business were made up, being a date not more than one hundred and eighty days before the issue of the prospectus:
- Whereas, in case of a company with respect to which a period of five years has not passed from the date of incorporation, the prospectus shall set out the reports made by the auditors upon the profits and losses of the business of the company for all financial years from the date of its incorporation, and assets and liabilities of its business on the last date before the issue of prospectus; and
- (iv) **Reports about the business or transaction** to which the proceeds of the securities are to be applied directly or indirectly;
- (c) **Make a declaration about the compliance of the provisions of this Act** and a statement to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of

India Act, 1992 and the rules and regulations made thereunder; and

(d) State such other matters and set out such other reports, as may be prescribed.

(2) Exception:— The above stated section does not apply to-

- (a) **to the issue to existing members or debenture-holders of a company**, of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant has a right to renounce (surrender) the shares or not under section 62(1)(a)(ii) in favour of any other person; or
- (b) **to the issue of a prospectus or form of application** relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange.

(3) Except the exceptions, the provisions of sub-section (1) shall apply to a prospectus or a form of application, whether issued on or with reference to the formation of a company or subsequently.

The date indicated in the prospectus shall be deemed to be the date of its publication.

(4) No requirement of issuing prospectus: No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless on or before the date of its publication, there has been delivered to the Registrar for registration, a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his duly authorised attorney.

(5) Expert not liable for the statement under the prospectus: The prospectus issued shall not include a statement purporting to be made by an expert, unless such an expert-

- is a person who is not, and has not been, engaged or interested in the formation or promotion or management, of the company, and
- has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of a copy of the prospectus to the Registrar for registration, and
- a statement to that effect shall be included in the prospectus.

(6) Prospectus to state the delivery of copy and documents to the registrar: Every prospectus issued shall, on the face of it,—

- (a) state that a **copy has been delivered** for registration to the Registrar, and
- (b) **specify any documents required to be attached to the copy** so delivered or refer to statements included in the prospectus which specify these documents.

(7) No registration of prospectus by the registrar: The Registrar shall not register a prospectus unless –

- the requirements of this section with respect to its registration are complied with, and

- the prospectus is accompanied by the consent in writing of all the persons named in the prospectus.

(8) Time period for the issue of prospectus: No prospectus shall be valid if it is issued more than ninety days after the date on which a copy thereof is delivered to the Registrar.

(9) In contravention of the provision: If a prospectus is issued in contravention of the provisions of this section, **the company** shall be punishable with fine varying from fifty thousand rupees to three lakh rupees **and every person** who is knowingly a party to the issue of such prospectus shall be punishable with imprisonment for a term which may extend to three years or with fine varying from fifty thousand rupees to three lakh rupees, or with both.

2.6 Variation in terms of contract or objects in prospectus

This section 27 of the Companies Act, 2013 provides that company shall not vary terms of a contract referred in the prospectus or objects for which the prospectus was issued.

The provision with respect to variation in terms of contract or objects in prospectus is as follows:

(1) Vary by special resolution: A company shall not, at any time, vary the terms of a contract referred to in the prospectus or objects for which the prospectus was issued, except by way of special resolution.

(2) Notice of resolution to shareholders: The details of the notice in respect of such resolution to shareholders, shall also be published in the newspapers (one in English and one in vernacular language) in the city where the registered office of the company is situated indicating clearly the justification for such variation.

Also that such company shall not use any amount raised by it through prospectus for buying, trading or otherwise dealing in equity shares of any other listed company.

(3) Exit offer to dissenting shareholders: The dissenting shareholders being those shareholders who have not agreed to the proposal to vary the terms of contracts or objects referred to in the prospectus, shall be given an exit offer by promoters or controlling shareholders at such exit price, and in such manner and conditions as may be specified by the Securities and Exchange Board by making regulations in this behalf.

According to the Companies **(Prospectus and Allotment of Securities)** Rules, 2014, where the company has raised money from public through prospectus and has any unutilized amount out of the money so raised, it shall not vary the terms of contracts referred to in the prospectus or objects for which the prospectus was issued except by passing a special resolution through postal ballot. The advertisement of the notice of resolution passed for varying the terms of any contract or altering the objects of the prospectus shall be published simultaneously with dispatch of Postal Ballot Notices to Shareholders. The notice shall also be placed on the web-site of the company, if any.

2.7 Offer of sale of shares by certain members of company

The section 28 of the Companies Act, 2013, provides that members whose shares are proposed to be offered to the public, shall collectively authorise the company, to take all actions in respect of offer of sale for and on their behalf .

(1) **Members proposes to offer holding of shares to the public:** Where certain members of a company propose, in consultation with the Board of Directors to offer, in accordance with the provisions of any law for the time being in force, whole or part of their holding of shares to the public, they may do so in accordance with such procedure as may be prescribed.

(2) **Document of offer to sale be deemed as prospectus:** Any document by which the offer of sale to the public is made shall, be deemed to be a prospectus issued by the company and all laws and rules made thereunder as to the contents of the prospectus and as to liability in respect of mis-statements in and omission from prospectus or otherwise relating to prospectus shall apply as if this is a prospectus issued by the company.

(3) **Members collectively authorized the company to take action:** The members, whether individuals or bodies corporate or both, whose shares are proposed to be offered to the public, shall collectively authorise the company, whose shares are offered for sale to the public, to take all actions in respect of offer of sale for and on their behalf and they shall reimburse the company all expenses incurred by it on this matter.

2.8 Public offers of securities to be in dematerialised form

According to section 29 of the Companies Act, 2013 public company making public offer and such other class or classes of companies as may be prescribed, shall issue the securities only through dematerialized form. The provision says -

(1) **Issue of securities in dematerialized form:** According to the provisions (a) every company making public offer; and (b) such other class or classes of public companies as may be prescribed, shall issue the securities only in dematerialised form by complying with the provisions of the Depositories Act, 1996 and the regulations made thereunder.

(2) **In case of other companies:** Whereas other companies, may convert its securities into dematerialised form or issue its securities in physical form in accordance with the provisions of this Act or in dematerialised form in accordance with the provisions of the Depositories Act, 1996 and the regulations made thereunder.

2.9 Advertisement of Prospectus

Comprehensive rules and regulations have been incorporated in the Companies Act, 2013 in respect of this basic document which is the only source for the investors to ascertain the soundness or otherwise of the company. Since the prospectus is intended to save the investing public from victimisation, the Legislature has aimed at securing the fullest disclosure of all material and essential particulars and laying the same before all the prospective buyers of shares.

Section 30 of the Companies Act, 2013 seeks to provide for an advertisement of any prospectus of a company to be published. Section provides that where an advertisement of any prospectus of a company is published, it shall specify therein-

- the contents of its memorandum as regards the objects, the liability of members and the amount of share capital of the company, and
- the names of the signatories to the memorandum and the number of shares subscribed for by them, and
- its capital structure.

2.10 Shelf Prospectus

The Companies Act, 2013 defines the term "shelf prospectus" which means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus.

Section 31 of the Companies Act, 2013 state the following law regarding the issue of the shelf prospectus:

(1) Filing of shelf prospectus with registrar: Any class or classes of companies, as the Securities and Exchange Board may provide by regulations in this behalf, may file a shelf prospectus with the Registrar.

(2) Filing of shelf prospectus: It can be filed- **(i)** at the stage of the *first offer of securities* included therein, which shall indicate a period not exceeding one year as the period of validity of such prospectus which shall commence from the date of opening of the first offer of securities under that prospectus, and **(ii)** in respect of a *second or subsequent offer of such securities* issued during the period of validity of that prospectus, no further prospectus is required.

(3) Filing of an information memorandum containing all material facts with the registrar- A company filing a shelf prospectus shall be required to file an information memorandum containing all material facts relating to: (i) new charges created, (ii) changes in the financial position of the company as have occurred between the first offer of securities or the previous offer of securities and the succeeding offer of securities, and (iii) such other changes as may be prescribed,

-with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus:

(4) Intimation of changes to the applicants: Where a company or any other person has received applications for the allotment of securities along with advance payments of subscription before the making of any such change, the company or other person shall intimate the changes to such applicants and if they express a desire to withdraw their application, the company or other person shall refund all the monies received as subscription

within fifteen days thereof.

(5) Shelf prospectus with information memorandum deemed to be prospectus: Where an information memorandum is filed, every time an offer of securities is made with all the material facts with the registrar, such memorandum together with the shelf prospectus shall be deemed to be a prospectus.

2.11 Red herring prospectus

The expression "red herring prospectus" means a prospectus which does not include complete particulars of the quantum or price of the securities included therein.

The law relating to the red herring prospectus given under section 32 is as follows:

- (1) Issue of red herring prospectus prior to prospectus:** Company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus.
- (2) Filing with the registrar:** A company proposing to issue a red herring prospectus shall file it with the Registrar at least three days prior to the opening of the subscription list and the offer.
- (3) Obligation and any variation in the red herring prospectus is same as that of prospectus:** A red herring prospectus shall carry the same obligations as are applicable to a prospectus and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus.
- (4) Prospectus with the details not included in the red herring prospectus:** Upon the closing of the offer of securities under this section, the prospectus stating therein the total capital raised, whether by way of debt or share capital, and the closing price of the securities and any other details as are not included in the red herring prospectus shall be filed with the Registrar and the Securities and Exchange Board.

2.12 Issue of application forms for securities

Section 33 of the Act relating to the issue of application forms for securities says that –

- (1)** The form of application for the purchase of any of the securities of a company shall be issued along with an abridged prospectus.

As per the definition contained in the section 2(1) of the Companies Act, 2013, abridged prospectus means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange board by making regulations in this behalf.

Exceptions: There are, however, certain *exceptions* to the above provision, where an abridged prospectus containing all the prescribed details need not accompany the Application Forms sent out. These exceptions are:

- (a)** in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to such securities; or
- (b)** in relation to securities which were not offered to the public.

(2) A copy of the prospectus shall, on a request being made by any person before the closing of the subscription list and the offer, be furnished to him.

(3) If a company makes any default in complying with the provisions of this section, it shall be liable to a penalty of fifty thousand rupees for each default.

2.13 Liability for Mis-Statements in the Prospectus

An untrue statement or misstatement is one, which is misleading, in the form and context in which it has been included in the prospectus. Where a certain matter which is material enough has been omitted from the prospectus, and the omission is calculated to mislead those who act on the faith of the prospectus, the prospectus shall be deemed, in respect of such omission, to be a prospectus in which an untrue statement is included. The prospectus in these circumstances may also be described as a 'misleading prospectus'.

The legal consequence of inclusion of mis-statement in a prospectus is that it attaches criminal and civil liability to certain persons.

Liability for the mis-statement in the prospectus can be covered under two headings;

A. Criminal liability for misstatements in prospectus (Section 34):

1. **Mis-statement in prospectus:** Where a prospectus is issued, circulated or distributed, and it includes in relation to it (i) any statement which is untrue or misleading in form or context in which it is included, or (ii) where any inclusion or omission of any matter is likely to mislead,

then every person who authorizes the issue of such prospectus shall be liable under section 447:

2. **Punishment for the mis-statement:** Where any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

3. **Exemption from the criminal liability:** This section shall not apply to a person if he proves that-

- (i) such statement or omission was immaterial, or
- (ii) he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.

B. Civil liability for misstatements in prospectus (Section 35):

1. **Persons liable for the mis-statement** – Where a person has subscribed for securities of

a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and every person who—

- (a) is a director of the company at the time of the issue of the prospectus;
- (b) has authorised himself to be named and is named in the prospectus as a director of the company, or has agreed to become such director,
- (c) is a promoter of the company;
- (d) has authorised the issue of the prospectus; and
- (e) is an expert referred in section 26,

shall, without prejudice to any punishment to which any person may be liable under section 36, be liable to pay compensation to every person who has sustained such loss or damage.

(2) Exemptions from the liability: No person shall be liable for the mis-statement, where such person proves that—

(a) **Withdrawn his consent before the issue of prospectus-** Where a person having consented to become a director of the company, withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(b) **Prospectus issued without his knowledge/ consent-** Where the prospectus was issued without the knowledge or consent of a person, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.

(3) **Prospectus issued with intent to defraud or for any fraudulent purpose-** Where it is proved that a prospectus has been issued with intent to defraud the applicants for the securities of a company or any other person or for any fraudulent purpose, every person referred in this section shall be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by any person who subscribed to the securities on the basis of such prospectus.

2.14 Punishment for fraudently inducing persons to invest money

Section 36 of the Companies Act, 2013 provides that such persons who fraudulently induces persons to invest money by making statement which is false, deceptive, misleading or deliberately conceals any facts, shall be punishable for fraud under section 447.

According to the section, any person shall be liable for fraud who, knowingly or recklessly, makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into, or to offer to enter into,—

- (a) any agreement for acquiring, disposing of, subscribing for, or underwriting securities; or

- (b) any agreement, the purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities; or
- (c) any agreement for obtaining credit facilities from any bank or financial institution.

2.15 Action by affected persons

The section 37 of the Companies Act, 2013, provides that a suit may be filed or any other action may be taken by any person, group of persons or any association of persons who have been affected by any misleading statement or the inclusion/ omission of any matter in the prospectus.

This new provision enables class action by person, group of persons or any association of persons affected by misleading prospectus. This section is applicable for section 34, 35 & 36 of the 2013 Act.

2.16 Punishment for personation for acquisition, etc., of securities

Section 38 of the Companies Act, 2013 lays the laws related to the personation for acquisition of the securities

(1) Personation of securities: Any person who—

- (a) makes or abets making of **an application in a fictitious name** to a company for acquiring, or subscribing for, its securities; or
- (b) makes or abets **making of multiple applications** to a company **in different names or in different combinations** of his name or surname for acquiring or subscribing for its securities; or
- (c) otherwise **induces directly or indirectly** a company to allot, or register any transfer of, securities to him, or to any other person in a fictitious name,
-then such person shall be liable for action under section 447.

(2) Provisions shall be stated in every prospectus and application: This provision shall be stated in every prospectus issued by a company and in every form of application for securities.

(3) Order of court on conviction: Where a person has been convicted under this section, the Court may also order disgorgement of gain, if any, made by, and seizure and disposal of the securities in possession of, such person.

(4) Amount to be credited to IEPF: The amount received through disgorgement or disposal of securities shall be credited to the Investor Education and Protection Fund.

2.17 Allotment of securities by company[Section 39]

Before we deal with the statutory restrictions in this regard, it will be worthwhile to understand the meaning of the term 'allotment'. As you know, the intending subscribers send, in reply to the prospectus issued by the company, applications to the company. These applications are mere offers to take, securities since the prospectus is just an invitation to make offer.

Allotment is the acceptance by the company of such offers to take securities. It is an appropriation of securities to an applicant for securities and appropriation out of the previously unappropriated capital of the company. That is why, if the securities which have been forfeited are reissued, you cannot call it an "allotment". The word "allotment" gives us the notion of a "lot". Therefore, there must first be a lot of securities then the division of them into value or classes and lastly allocation of them among various applicants [*Calcutta Stock Exchange Association, In re.*, 61 C.W.N. 418 - 0957 Cal. 438].

We shall now discuss the restrictions imposed by the Act on allotment of securities.

- (1) **Prohibition on allotment of securities:** No allotment of any securities of a company offered to the public for subscription shall be made, unless the amount stated in the prospectus as the minimum amount has been subscribed and the sums payable on application for the amount so stated have been paid to and received by the company by cheque or other instrument.
- (2) **Minimum amount payable on security:** The amount payable on application on every security shall not be less than five per cent. of the nominal amount of the security, or such other percentage or amount, as may be specified by the Securities and Exchange Board.
- (3) **Minimum amount to be received within 30 days:** If the stated minimum amount has not been subscribed and the sum payable on application is not received within a period of thirty days from the date of issue of the prospectus, or such other period as may be specified by the Securities and Exchange Board, the amount received shall be returned within such time and manner as may be prescribed.
- (4) **Filing of return of allotment:** Whenever a company having a share capital makes any allotment of securities, it shall file with the Registrar a return of allotment in such manner as may be prescribed.
- (5) **Penalty in contravention of the provisions:** In case of default, the company and its officer who is in default, shall be liable to a penalty, for each default, of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

According to the Companies (Prospectus and Allotment of Securities) Rules, 2014, if the stated minimum amount has not been subscribed and the sum payable on application is not received within the period specified therein, then the application money shall be repaid within a period of fifteen days from the closure of the issue and if any such money is not so repaid within such period, the directors of the company who are officers in default shall jointly and severally be liable to repay that money with interest at the rate of fifteen percent per annum. The application money to be refunded shall be credited only to the bank account from which the subscription was remitted.

2.18 Securities to be dealt with in stock exchanges.[Section 40]

- (1) **Companies to obtain permission for the securities from the recognized stock exchange:** Every company making public offer shall make an application to one or more recognised stock exchange or exchanges and obtain permission for the securities to be dealt with in such stock exchange or exchanges.

(2) **Prospectus to state the name of the stock exchange:** Where a prospectus states that an application according to the above provision has been made, such prospectus shall also state the name or names of the stock exchange in which the securities shall be dealt with.

(3) **Monies received for subscription to be kept in separate bank account:** All monies received on application from the public for subscription to the securities shall be kept in a separate bank account in a scheduled bank and shall be utilised for the following purposes only—

(a) for **adjustment against allotment of securities** where the securities have been permitted to be dealt with in the stock exchange or stock exchanges specified in the prospectus; or

(b) **for the repayment of monies** within the time specified by the Securities and Exchange Board, received from applicants in pursuance of the prospectus, where the company is unable to allot securities.

(4) **Act not in compliance with the requirements of this section:** Any condition purporting to require or bind any applicant for securities to waive compliance with any of the requirements of this section, shall be void.

(5) **Punishment:** If a default is made in complying with the provisions of this section, then both the company and every officer of the company shall be punishable with a fine / imprisonment or with both.

(i) **Company** shall be punishable with not less than five lakh rupees which may extend to fifty lakh rupees, and

(ii) **Every officer of the company who is in default** shall be punishable with imprisonment for a term extending up to one year or with fine not less than fifty thousand rupees which may extend to three lakh rupees, or with both.

(6) **Payment of commission for subscription:** A company may pay commission to any person in connection with the subscription to its securities subject to the prescribed conditions. The Companies (Prospectus and Allotment of Securities) Rules, 2014 prescribes the conditions for the payment of commission.

Condition for the payment of commission: A company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, whether absolute or conditional, subject to the following conditions, namely:

(a) **Authorized by the Articles:** The payment of such commission shall be authorized in the company's articles of association;

(b) **Paid out of the proceeds of the issue/profit:** The commission may be paid out of proceeds of the issue or the profit of the company or both;

(c) **Rate of Commssion:** The rate of commission paid or agreed to be paid shall not exceed, in case of shares, 5% of the price at which the shares are issued or a rate authorised by

the articles, whichever is less, and in case of debentures, shall not exceed 2.5% of the price at which the debentures are issued, or as specified in the company's articles, whichever is less;

- (d) **Disclosure of the particulars:** The prospectus of the company shall disclose -
 - (i) the name of the underwriters
 - (ii) the rate and amount of the commission payable to the underwriter; and
 - (iii) the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.
- (e) **No payment of commission:** There shall not be paid commission to any underwriter on securities which are not offered to the public for subscription.
- (f) **Copy of the contract to be delivered to the Registrar:** A copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

2.19 Global depository Receipts

Section 41 of the Companies Act, 2013 is a newly added provision according to which company may issue global depository receipts to transact business with in a depository mode in any foreign country. The law says that-

A company may, after passing a special resolution in its general meeting, issue depository receipts in any foreign country.

The Companies (Issue of Global Depository Receipts) Rules, 2014, lays the conditions and the manner in which a company may issue depository receipts in a foreign country.

Eligibility to issue depository receipts. - A company may issue depository receipts provided it is eligible to do so in terms of the Scheme and relevant provisions of the Foreign Exchange Management Rules and Regulations.

"Scheme" means the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 or any modification or re-enactment thereof.

Conditions for issue of depository receipts. - (1) **Passing of resolution:** The Board of Directors of the company intending to issue depository receipts shall pass a resolution authorising the company to do so.

(2) **Approval of shareholders:** The company shall take prior approval of its shareholders by a special resolution to be passed at a general meeting:

(3) **Depository receipts shall be issued by an overseas depository bank:** The depository receipts shall be issued by an overseas depository bank appointed by the company and the underlying shares shall be kept in the custody of a domestic custodian bank.

(4) **Compliance with all the provisions, schemes, regulations etc.:** The company shall

ensure that all the applicable provisions of the Scheme and the rules or regulations or guidelines issued by the Reserve Bank of India are complied with before and after the issue of depository receipts.

(5) Compliance report to be placed at the meeting: The company shall appoint a merchant banker or a practising chartered accountant or a practising cost accountant or a practising company secretary to oversee all the compliances relating to issue of depository receipts and the compliance report taken from such merchant banker or practising chartered accountant or practising cost accountant or practising company secretary, as the case may be, shall be placed at the meeting of the Board of Directors of the company or of the committee of the Board of directors authorised by the Board in this regard to be held immediately after closure of all formalities of the issue of depository receipts:

Manner for issue of depository receipts. - (1) The depository receipts can be issued by way of public offering or private placement or in any other manner prevalent abroad and may be listed or traded in an overseas listing or trading platform.

(2) The depository receipts may be issued against issue of new shares or may be sponsored against shares held by shareholders of the company in accordance with such conditions as the Central Government or Reserve Bank of India may prescribe or specify from time to time.

(3) The underlying shares shall be allotted in the name of the overseas depository bank and against such shares, the depository receipts shall be issued by the overseas depository bank abroad.

Proceeds of issue - The proceeds of issues of depository receipts shall either be remitted to a bank account in India or deposited in an Indian bank operating abroad or any foreign bank (which is a Scheduled Bank under the Reserve Bank of India Act, 1934) having operations in India with an agreement that the foreign bank having operations in India shall take responsibility for furnishing all the information which may be required and in the event of a sponsored issue of Depository Receipts, the proceeds of the sale shall be credited to the respective bank account of the shareholders.

Right to vote to the holder of depository receipts: (1) A holder of depository receipts may become a member of the company and shall be entitled to vote as such only on conversion of the depository receipts into underlying shares after following the procedure provided in the Scheme and the provisions of this Act.

(2) Until the conversion of depository receipts, the overseas depository shall be entitled to vote on behalf of the holders of depository receipts in accordance with the provisions of the agreement entered into between the depository, holders of depository receipts and the company in this regard.

Non applicability of certain provisions of the Act. - (1) The provisions of the Act and any rules related to public issue of shares or debentures shall not apply to issue of depository receipts abroad.

(2) The offer document, if prepared for the issue of depository receipts, shall not be treated

as a prospectus or an offer document within the meaning of this Act and all the provisions as applicable to a prospectus or an offer document shall not apply to a depository receipts offer document.

(3) Notwithstanding anything contained under section 88(Register of members etc.) of the Act, until the redemption of depository receipts, the name of the overseas depository bank shall be entered in the Register of Members of the company.

2.20 Offer of invitation for subscription of securities on private placement

Section 42 of the Act describes the process of offer or invitation for subscription of securities on private placement and conditions to prevent public issues in the shield of private placement.

According to section 42 of the Companies Act, 2013, a company may make an offer or invitation of securities by way of private placement. The term "private placement" means any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and by fulfilment of the conditions specified in this section.

This section lays the conditions through which invitation can be made. The law contained in the provision is as follows:

(1) **Issue of private placement offer letter:** Without effecting to the provisions of section 26, a company may make private placement through issue of a private placement offer letter.

(2) **Offer/ invitation to number of persons:** The offer of securities or invitation to subscribe securities, shall be made maximum to 50 persons or such higher number as may be prescribed, in a financial year and on such conditions (including the form and manner of private placement) as may be prescribed.

As per the Rule 14 sub-rule (2) of the Companies (prospectus and Allotment of securities) Rules, 2014, limit on membership i.e., the higher number, have been prescribed. According to it, offer of securities or invitation to subscribe securities shall be made to not more than two hundred persons in the aggregate in a financial year.

However this does not include- qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option as per provisions of section 62(1)(b)].

(3) **Offer/ invitation made to more than the prescribed number of persons:** A company, listed/unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions related to public offer of this Chapter (whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised

stock exchange in or outside India).

(4) **No issue of fresh offer/ invitation:** No fresh offer or invitation shall be made, unless-

- the allotments with respect to any offer or invitation made earlier have been completed, or
- that offer or invitation has been withdrawn, or
- abandoned by the company.

(5) **Offer / invitation treated as public offer:** Any offer or invitation not in compliance with the provisions of this section shall be treated as a public offer and all provisions of this Act, and the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 shall be required to be complied with.

(6) **Payment of amount:** All monies payable towards subscription of securities under this section shall be paid through cheque or demand draft or other banking channels but not by cash.

(7) **Time for allotment of securities:** A company making an offer or invitation under this section shall allot its securities within 60 days from the date of receipt of the application money for such securities.

(8) **Default in allotment of securities:** Where the company is not able to allot the securities within stated period, it shall repay the application money to the subscribers within 15 days from the date of completion of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest @ of 12 % per annum from the expiry of the sixtieth day:

(9) **Separate Bank Account:** Monies received on application shall be kept in a separate bank account in a scheduled bank and shall be utilised only for the following purpose-

- (a) for adjustment against allotment of securities; or
- (b) for the repayment of monies where the company is unable to allot securities.

(10) **Offers made to the persons whose name is recorded:** Offers shall be made only to such persons whose names are recorded by the company prior to the invitation to subscribe, and that such persons shall receive the offer by name, and that a complete record of such offers shall be kept by the company and complete information about such offer shall be filed with the Registrar within a period of thirty days of circulation of relevant private placement offer letter.

(11) **No publicity required:** Company offering securities under this section shall not publish any public advertisements or utilise any media, marketing or distribution channels or agents to inform the public at large about such an offer.

(12) **Filing with the registrar:** Whenever a company makes any allotment of securities, it shall file with the Registrar a return of allotment, including the complete list of all security-

holders, with their full names, addresses, number of securities allotted and such other relevant information.

(13) **In contravention of the section:** If a company makes an offer or accepts monies in contravention of this section-

Persons liable	Penalty
Company	• May extend to the amount involved in the offer or invitation, or
Promoters	• Two crore rupees- whichever is higher, and
Directors	• Company shall also refund all monies to subscribers within a period of thirty days of the order imposing the penalty.

The Companies (Prospectus and Allotment of Securities) Rules, 2014, provides certain limitations on the companies with respect to making of a private placement.

Limitations on making a private placement by company: A company shall not make a private placement of its securities, unless-

- (a) **Previous approval of shareholder:** The proposed offer of securities or invitation to subscribe securities has been previously approved by the shareholders of the company, by a Special Resolution, for each of the Offers or Invitations.

Provided that in the explanatory statement annexed to the notice for the general meeting the basis or justification for the price (including premium, if any) at which the offer or invitation is being made shall be disclosed.

Whereas in case of offer or invitation for non- convertible debentures it shall be sufficient if the company passes previous special resolution only once in a year for all the offers or invitation for such debentures during the year.

As per the Companies (Prospectus and Allotment of Securities) Amendment Rules, 2014, dated 30th June 2014 further a new proviso has been added. According to which also that in case of an offer or invitation for non-convertible debentures referred to in the second proviso, made within a period of six months from the date of commencement of these rules, the special resolution referred to in the second proviso may be passed within the said period of six months from the date of commencement of these rules."

- (b) **Offer/ invitation to the number of persons:** such offer or invitation shall be made to not more than two hundred persons in the aggregate in a financial year.

Provided that any offer or invitation made to qualified institutional buyers, or to employees of the company under a scheme of employees stock option as per provisions of clause (b) of sub-section (1) of section 62 shall not be considered while calculating the limit of two hundred persons;

- (c) **Dependence on the value of offer/invitation:** The value of such offer or invitation per person shall be with an investment size of not less than twenty thousand rupees of face value of the securities;
- (d) **Company to maintain record of bank account:** The payment to be made for subscription to securities shall be made from the bank account of the person subscribing to such securities and the company shall keep the record of the bank account from where such payments for subscription have been received.

2.21 Acceptance of Deposits by Companies

Deposits from the public are an important mode of finance in the corporate sector. It is accordingly necessary to control the companies inviting deposits from the public in order to safeguard the general and wider interest of the public at large.

According to the definition given under section 2(31) of the Companies Act, 2013, the term 'deposit' includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include such categories of amount as may be prescribed in consultation with the RBI.

According to the Companies (**Acceptance of Deposits**) Rules, 2014, following categories of amount may not be considered as deposit-

- (i) Any amount received from the Central Government or a state Government, or from any other source whose repayment is guaranteed by the Central Government or a State Government, or any amount received from a local authority, or any amount received from a statutory authority constituted under an Act of Parliament or a State Legislature ;
- (ii) Any amount received from foreign Governments, foreign international banks, multilateral financial institutions etc. subject to the provisions of Foreign Exchange Management Act, 1999
- (iii) any amount received as a loan or facility from any banking company.
- (iv) Any amount received as a loan or financial assistance from Public Financial Institutions
- (v) any amount received against issue of commercial paper or any other instruments issued in accordance with the guidelines or notification issued by the Reserve Bank of India;
- (vi) any amount received by a company from any other company;
- (vii) any amount received and held pursuant to an offer made in accordance with the provisions of the Act towards subscription to any securities, (including share application money or advance towards allotment of securities, pending allotment), so long as such amount is appropriated only against the amount due on allotment of the securities applied for;

If the securities for which application money or advance for such securities was received cannot be allotted within 60 days from the date of receipt of the application money or advance for such securities and such application money or advance is not refunded to the subscribers within 15 days from the date of completion of 60 days, such amount shall be treated as a

deposit under these rules.

(viii) any amount received from a person who, at the time of the receipt of the amount, was a director of the company

(ix) any amount raised by the issue of bonds or debentures secured by a first charge or a charge ranking pari passu with the first charge on any assets referred to in Schedule III of the Act

(x) any amount received from an employee of the company

(xi) any non-interest bearing amount received or held in trust;

(xii) any amount received in the course of, or for the purposes of, the business of the company – as an advance for the supply of goods or provision of services accounted for, as advance

(xiii) any amount brought in by the promoters of the company by way of unsecured loan in pursuance of the stipulation of any lending financial institution or a bank

(xiv) any amount accepted by a Nidhi company in accordance with the section 406 of the Act.

(1) Prohibition on acceptance of deposits from public: According to section 73 of the Companies Act, 2013, on and from commencement of this Act, no company shall invite, accept or renew deposits under this Act from the public except in a manner provided under this Chapter of the Act.

Exception : This sub-section with respect to the acceptance of deposit from public shall not apply to the following company:

(i) banking company ,

(ii) non- banking financial company as defined in the Reserve Bank of India Act, 1934,

(iii) a housing finance company registered with the National Housing Bank established under the National Housing Bank Act, 1987 ,and

(iv) and such other company as the Central Government may specify, after consultation with the Reserve Bank of India.

(2) When company may accept deposit from its members: A company may, subject to the passing of a resolution in general meeting and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, accept deposits from its members on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subject to the fulfilment of the following conditions, namely:—

(a) issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars in such form and in such manner as may be prescribed;

- (b) filing a copy of the circular along with such statement with the Registrar within thirty days before the date of issue of the circular;
- (c) depositing such sum which shall not be less than fifteen per cent. of the amount of its deposits maturing during a financial year and the financial year next following, and kept in a scheduled bank in a separate bank account to be called as deposit repayment reserve account;
- (d) providing such deposit insurance in such manner and to such extent as may be prescribed;
- (e) certifying that the company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits; and
- (f) providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company:

Where a company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as "unsecured deposits" and shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits.

(3) Repayment of deposit: Every deposit accepted by a company shall be repaid with interest in accordance with the terms and conditions of the agreement.

(4) Failure on the repayment of deposit: Where a company fails to repay the deposit or part thereof or any interest thereon, the depositor concerned may apply to the Tribunal for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non-payment and for such other orders as the Tribunal may deem fit.

As per the Companies (Removal of Difficulties) Second Order, 2014 dated 2nd of June, 2014, Central government makes an order to remove certain difficulties that have arisen in giving effect to the provisions of Section 73. According to it, until a date is notified by the Central Government under sub-section (1) of Section 434 of the Companies Act, 2013 (18 of 2013), the Company Law Board constituted in pursuance of sub-section (1) of Section 10E of the Companies Act, 1956 shall exercise the jurisdiction, powers, authority and functions under this sub-section (4) of Section 73 of the Companies Act, 2013.

(5) Application of the amount of DRR account: The deposit repayment reserve (DRR) account shall not be used by the company for any purpose other than repayment of deposits

(6) Repayment of deposits, etc, accepted before commencement of this Act:

(i) According to section 74 of the Companies Act, 2013, Where in respect of any deposit accepted by a company before the commencement of this Act, the amount of such deposit or part thereof or any interest due thereon remains unpaid on such commencement or becomes due at any time thereafter, the company shall—

- (a) file, within a period of three months from such commencement or from the date on which such payments, are due, with the Registrar a statement of all the deposits accepted by

the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment, notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law; and

(b) repay within one year from such commencement or from the date on which such payments are due, whichever is earlier.

(ii) The Tribunal may on an application made by the company, after considering the financial condition of the company, the amount of deposit or part thereof and the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.

As per the Companies (Removal of Difficulties) Fourth Order, 2014 dated 6th of June 2014, the Central Government hereby makes the order that until a date is notified by the Central Government, the Company Law Board [constituted in pursuance of Section 10E(1) of the Companies Act, 1956] shall exercise the jurisdiction, powers, authority and functions of the Tribunal here under said Act.

(iii) If a company fails to repay the deposit or part thereof or any interest thereon within the time specified in sub-section (1) or such further time as may be allowed by the Tribunal under sub-section (2), the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than one crore rupees but which may extend to ten crore rupees and every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years or with fine which shall not be less than twenty-five lakh rupees but which may extend to two crore rupees, or with both.

(7) Acceptance of deposits in contravention to rules: Sub-section (6) of section 58 A of the Companies Act, 1956 levies penalties on the company for accepting or inviting deposits in contravention of the rules made by the Central Government. If the contravention relates to the acceptance of deposit, the amount of fine is equal to, or more than, the amount of the deposit so accepted. But in the case of invitation of any deposit in contravention of the said rules, the minimum amount of fine is at least ₹ 50,000 and the maximum limit is ₹ 10 lakhs. Besides, every officer of the company who is in default shall be punishable with imprisonment for a term extending up to 5 years and also liable with fine.

[Note: The corresponding provision is given in the section 75 of the Companies Act, 2013, which is not yet notified. For the reference see the annexure]

(8) Acceptance of deposits from public by certain companies: According to section 76. of the Companies Act, 2013 - (1) a public company, having such net worth of not less than one hundred crore rupees or turnover of not less than five hundred crore rupees, may accept deposits from persons other than its members subject to compliance with the requirements provided in sub-section (2) of section 73 and subject to such rules as the Central Government may, in consultation with the Reserve Bank of India, prescribe:

Provided that such a company shall be required to obtain the rating (including its network, liquidity and ability to pay its deposits on due date) from a recognised credit rating agency for informing the public the rating given to the company at the time of invitation of deposits from the public which ensures adequate safety and the rating shall be obtained for every year during the tenure of deposits:

Provided further that every company accepting secured deposits from the public shall within thirty days of such acceptance, create a charge on its assets of an amount not less than the amount of deposits accepted in favour of the deposit holders in accordance with such rules as may be prescribed.

(2) The provisions of this Chapter shall, mutatis mutandis, apply to the acceptance of deposits from public under this section.

2.22 Application of premiums received on issue of shares

Section 52 of the Companies Act, 2013 provides that a company shall transfer the amount received by its as securities premium to securities premium account and state the manner in which the amount in the account can be applied. Section 52 says-

(1) **Premium to be transferred to the securities premium account:** Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the premium received on those shares shall be transferred to a "securities premium account".

The provisions of this Act relating to reduction of share capital of a company shall apply as if the securities premium account were the paid-up share capital of the company, except as provided in this section.

(2) **Application of share premium account:** The securities premium account may be applied by the company—

- (a) towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares;
- (b) in writing off the preliminary expenses of the company;
- (c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;
- (d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or
- (e) for the purchase of its own shares or other securities under section 68.

(3) **Companies authorized to apply share premium account :** The securities premium account may, be applied by such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133,—

- (a) in paying up unissued equity shares of the company to be issued to members of the company as fully paid bonus shares; or
- (b) In writing off the expenses of or the commission paid or discount allowed on any issue of equity shares of the company; or
- (c) for the purchase of its own shares or other securities under section 68.

2.23 Restrictions on purchase by company or giving of loans by it for purchase of its shares

Purchase of or loans to others for purchasing its own shares by company prohibited - A fundamental principle of Company Law was that a Company cannot buy its own shares. This is laid by Section 67 of the Companies Act, 2013, which provides that no company limited by shares, and so guarantee company having a share capital shall buy its own shares, unless the consequent reduction of share capital is effected under the provisions of this Act. No public company shall give any financial assistance (by mean of a loan, guarantee, by the provisioning of security or otherwise) for purchase or subscription made or to be made, by any person of or for any shares in the company or in its holding company. On contravention of the above, the company shall be punishable with fine (from one lakh rupees to twenty-five lakh rupees) and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine (from one lakh rupees to twenty-five lakh rupees)

Exceptions: There are, however, certain exceptions where the company may provide the financial assistance, namely:

- (a) the lending of money by a banking company in the ordinary course of its business;
- (b) the provision is made by a company for lending of money in accordance with any scheme approved by company through special resolution with such requirements as may be prescribed, for the purchase of, or subscription for, fully paidup shares in the company or its holding company, if the purchase of, or the subscription for, the shares held by trustees for the benefit of the employees or such shares held by the employee of the company;
- (c) the giving of loans by a company to persons in the employment of the company other than its directors or key managerial personnel, for an amount not exceeding their salary or wages for a period of six months with a view to enabling them to purchase or subscribe for fully paid-up shares in the company or its holding company to be held by them by way of beneficial ownership:

However, disclosures in respect of voting rights not exercised directly by the employees in respect of shares to which the scheme relates shall be made in the Board's report in such manner as may be prescribed. [Section 67].

- (d) nothing in Section 67 shall affect the right of a company to redeem any preference shares issued under this Act or under any previous Companies law.

2.24 Whether a Company can 'buy-back' its own Securities?

Section 68 of the Companies Act, 2013 provides the power of a company to purchase its own securities subject to certain conditions

(1) Sources of funds for buy-back of shares: A company can purchase its own shares or other specified securities. The purchase should be out of:

- (i) its free reserves; or
- (ii) the securities premium account; or
- (iii) the proceeds of the issue of any shares or other specified securities.

However, buy-back of any kind of shares or other specified securities cannot be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities [Section 68(1)].

"Specified securities" includes employees' stock option or other securities as may be notified by the Central Government from time to time.

(2) Conditions for buy-back: The company shall not purchase its own shares or other specified securities unless:

- (a) the buy-back is authorised by its articles;
- (b) a special resolution authorising the buy-back is passed in general meeting of the company; (except where— (i) the buy-back is, ten per cent. or less of the total paid-up equity capital and free reserves of the company; and (ii) such buy-back has been authorised by the Board by means of a resolution passed at its meeting;
- (c) the buy-back is 25% or less of the aggregate of paid-up capital and free reserves of the company;

Provided that the buy-back of equity shares in any financial year shall not exceed 25% of its total paid up equity capital in that financial year.

- (d) the ratio of the aggregate debts(secured and unsecured) owed by the company after buy back is not more than twice the paid up capital and its free reserves;

Provided that the Central Government may prescribe a higher ratio of the debt to capital and free reserves for a class or classes of companies;

The expression "free reserves" for the purposes of this section, includes securities premium account.

- (e) all the shares or other specified securities for buy-back are fully paid-up;

- (f) the buy-back of the shares or other specified securities listed on any recognised stock exchange is in accordance with the regulations made by SEBI in this behalf;
- (g) the buy-back in respect of shares or other specified securities other than those specified in Clause (f) is in accordance with rules as may be prescribed. [Sections 68(2)]

Provided that no offer of buy-back, shall be made within a period of one year from the date of the closure of the preceding offer of buy-back, if any.

(3) Procedure before buy-back: The notice of the meeting at which special resolution is proposed to be passed shall be accompanied by an explanatory statement stating -

- (a) a full and complete disclosure of the all material facts;
- (b) the necessity for the buy-back;
- (c) the class of shares or securities intended to be purchased under the buy back;
- (d) the amount to be invested under the buy-back; and
- (e) the time limit for completion of buy-back.[Sections 68(3)]

(4) Time limit for completion of buy-back: Every buy-back shall be completed within twelve months from the date of passing the special resolution or a resolution passed by the Board at general meeting authorising the buy-back. [Sections 68(4)]

(5) Buy-Back from Whom? : The buy-back under Sub-section (1) may be -

- (a) from the existing share holders or security holders on a proportionate basis; or
- (b) from the open market; or
- (c) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity. .[Sections 68(5)]

(6) Declaration of Solvency: Where a company has passed a special resolution under clause (b) of Sub-section (2) or the Board has passed a resolution under the first proviso to clause (b) of Sub Section (2) to buy-back its own shares or other securities under this section, it shall, before making such buy-back, file with the Registrar and the Securities and Exchange Board of India a declaration of solvency in the form as may be prescribed and verified by an affidavit to the effect that the Board has made a full inquiry into the affairs of the company as a result of which they have formed an opinion that it is capable of meeting its liabilities and will not be rendered insolvent within a period of one year of the date of declaration adopted by the Board, and signed by at least two directors of the company, one of whom shall be the managing director, if any;

Provided that no declaration of solvency shall be filed with the Securities and Exchange Board of India by a company whose shares are not listed on any recognised stock exchange..[Sections 68(6)]

(7) Extinguishment of Securities: Where a company buys-back its own securities other specified securities, it shall extinguish and physically destroy the shares or securities so

bought-back within seven days of the last date of completion of buy-back.[Sections 68(7)]

(8) Cooling Period: Where a company completes a buy-back of its shares or other specified securities under this section, it shall not make further issue of same kind of shares (including allotment of further shares under clause (a) of Sub-section (1) of Section 62 or other specified securities within a period of six months except by way of bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares. .[Sections 68(8)]

(9) Register of Buy Back: Where a company buys-back its shares or other specified securities under this section, it shall maintain a register of the shares or securities so bought, the consideration paid for the shares or securities bought-back, the date of cancellation of shares or securities, the date of extinguishing and physically destroying the shares or securities and such other particulars as may be prescribed. .[Sections 68(9)]

(10) Filing of Buy-back Return: A company shall, after completion of the buy-back under this section, file with the Registrar and the Securities and Exchange Board of India, a return containing such particulars relating to the buy-back within thirty days of such completion, as may be prescribed:

Provided that no return shall be filed with the Securities and Exchange Board of India by a company whose shares are not listed on any recognised stock exchange. .[Sections 68(10)]

(11) Penalty for Default: If a company makes default in complying with the provisions of this section or any regulations made by SEBI under clause (f) of Sub-section (2), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both. .[Sections 68(11)]

Transfer of certain sums to Capital Redemption Reserve account - Section 69: Where a company purchases its own shares out of free reserves or securities premium account, then a sum equal to the nominal value of the share so purchased shall be transferred to the capital redemption reserve account and details of such transfer shall be disclosed in the balance sheet.

The capital redemption reserve account may be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

Prohibition for buy-back in certain circumstances - Section 70: This section of the Companies Act, 2013 prohibits the company for buy back in the certain circumstances.

(1) The provision says that no company shall directly or indirectly purchase its own shares or other specified securities-

(a) through any subsidiary company including its own subsidiary companies; or

- (b) through any investment company or group of investment companies; or
- (c) if a default, is made by the company, in repayment of deposits or interest payment thereon, redemption of debentures or preference shares or payment of dividend to any shareholder or repayment of any term loan or interest payable thereon to any financial institutions or banking company.,.

But where the default is remedied and a period of three years has lapsed after such default ceased to subsist, there such buy-back is not prohibited.

(2) No company shall directly or indirectly purchase its own shares or other specified securities in case such company has not complied with provisions of Sections 92(Annual Report), 123(Declaration of dividend), 127(Punishment for failure to distribute dividends), and section 129(Financial Statements).

2.25 Membership

Section 2(55) of the Companies Act, 2013 defines " Member". "member", in relation to a company, means—

- (i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;
- (ii) every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;
- (iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;

Thus the Act enables you to become a member of a company by subscribing to the memorandum. The subscriber to the memorandum is deemed to have agreed to become a member of the company, and on its registration, is entered as member in its register of members. The subscriber to the memorandum becomes a member, on registration of the company, even without the shares having been allotted to him and is liable as a contributory when the company is wound up [*Universal Transport Co. vs. Jagjit Singh* (1956) Comp. Case. 36 *Babulal vs. Naraina Sugar Mill* (1958) Comp. Case. 155].

Membership can also be had by any other person who agrees in writing to become a member of the company and whose name is entered in its register of members, since in such a case, he is deemed to be a member. Since his agreement needs to be in writing, one cannot be deemed to be a member on ground of estoppel, simply because his name appears in the register of members. Where, however, a person's name is there in the register and he has, in fact, accepted the position and acted as a member, the agreement will be presumed to be in writing until the presumption is rebutted by proof to the contrary.

Apart from subscribers to memorandum and every other person who agrees in writing to become a member of a company, every person holding shares of the company and whose

name is entered as a beneficial owner in the records of a depository; shall also be deemed to be a member of the concerned company”.

A person can also become a member through transfer of shares under Section 56 or by transmission [*We shall discuss transfer and transmission in Chapter 3*].

(a) Can a minor become a member?

Now a question may arise in your mind, whether a minor or a company can become a member. It is true that the Act prescribes no qualification for membership. Membership entails an agreement and this agreement can be enforced in the Court. Therefore, the contractual capacity as envisaged by the Indian Contract Act, 1872 should be taken into consideration. It has been held in *Mohri Bibi vs. Dharmadas Ghose (1930) 30 Cal 531 (P.C.)* that since a minor has no contractual capacity, the agreement with a minor is void. Therefore, a minor or a lunatic cannot enter into an agreement to become a member.

For *example*, a father applied for shares in a company as guardian of his minor daughter. The company issued shares and registered them in the name of the minor describing her as minor. The transaction was void and the father who signed the application on the minor's behalf could not be treated as having contracted for the shares; as such he could not be placed on the list of contributories when the company was wound up [*Palaniappa vs. Official Liquidator AIR 1942 Mad. 470*]. But what will happen if the directors allot share to a minor in response to his application, without knowing that he was a minor and enter his name in the register of members? As soon as the company comes to know of this fact, it can avoid the allotment and strike the name of the minor off the register of members. But the company must refund the entire money to the minor, which it obtained in relation to the shares allotted. Can the minor be likewise compelled to restore to the company the benefits (if any) received by him from the allotment of shares? It is a matter for the Court to decide, regard being had to the facts and circumstances of each case.

But as regards the rescission of the contract, in point of time, the minor and the company are on a little different footing. Even after attaining majority, the minor can deny his liability on the shares on the ground of minority. But the company cannot successfully impeach the action of the minor's repudiation by setting up the plea that he received the dividend during his minority or that he had made a fraudulent representation of his age in the application [*Sadiq Ali vs. Jay Kishore, 30 Bomb. L.R. 1346 (1); P.C. Balangowada vs. Godigeppa 3 Bomb. L.R. 350*]. If, in this illustration, the minor received dividends after he had attained majority, could he legally be allowed to evade his liability on the shares? The answer is 'no'. This is because he would be deemed to have intentionally led the company to believe him to be a share holder and on the faith of such belief to pay him the dividends, therefore, he would be estopped by this conduct, while being a person *sui juris* (of his own right), from denying as between himself and the company that he is a shareholder [*Fazalbhoy vs. The Credit Bank of India Ltd. 39 Bomb. 331*].

However, notice that in some later decisions, a minor has been permitted to be a shareholder. The Company Law Board has laid down in *Nandita Jain v. Bennet Coleman & Co. Ltd.* that a minor can become a member provided four conditions are fulfilled:

- (a) Company must be a Co. Ltd. by shares.
- (b) Shares are fully paid up.
- (c) Application for transfer is made on behalf of minor by lawful guardian.
- (d) The transfer is manifestly for the benefit of the minor.

This was also confirmed in *S.L. Bagree v. Britannia Industries*.

In also *Diwan Singh v. Minerva Films Ltd.* [(3958) 28 Comp. Cases 191 (Punj.), (1959) 29 Comp. Cases 263 (Punj.)], the Punjab High Court held that there is no legal bar to minor becoming a member of a company by acquiring shares (by way of transfer) provided the shares are fully paid and no further obligation or liability is attached to them.

Minor can become member by transfer or transmission, but a company may not allow a minor to be a member by allotment.

(b) Can a company become a member?

Section 19 of the Companies Act, 2013 provides that no company shall hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void.

Exception: This provision shall not apply to a case—

- (a) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or
- (b) where the subsidiary company holds such shares as a trustee; or
- (c) where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company:

However, provision further states that the subsidiary company shall have a right to vote at a meeting of the holding company only in respect of the shares held by it as a legal representative or as a trustee, as referred above in clause (a) or clause (b).

The reference in this section 'to the shares of a holding company' which is a company limited by guarantee or an unlimited company, not having a share capital, shall be taken as a reference to the interest of its members, whatever be the form of interest.

(c) Termination of membership: Membership is terminated when a person's name is removed from the register of members for some proper reason. This may occur when: (a) he transfers all of his shares; (b) his shares are forfeited, surrendered or sold to enforce a lien; (c) he holds redeemable preference shares and they are redeemed; (d) he dies and his legal representative transfers the shares or secures their registration in his own name; (e) his contract to take the shares is rescinded or repudiated; (f) he becomes insolvent and the Official Assignee or Receiver disclaims the shares or transfers them; and (g) the shares are held by a company in the course of liquidation, and the liquidator disclaims the shares or transfers them.

The Register of members, however, is only, *prima facie* evidence as to whether a person is a member or not and if a person's name is improperly removed, all his rights and obligations as a member continue to remain the same.

On a member's death, his name remains on the register and his estate continues to be member until his legal representative takes either of the steps mentioned in clause (d) above i.e., he transfer the shares or secures their registration in his own name. He can receive dividends and other advantages to which he would be entitled as if he were the registered holder of the share except that he shall not be entitled in respect of it to exercise any right given by membership in relation to meetings of the company. However, the Board may at any time by notice can compel him to make an election under clause (d) above. [See Regulation 26, Proviso, Schedule I of the Companies Act, 2013].

(d) Members and shareholders: At this stage of your study, you know the different ways in which you can become a member of a company. Here, we would draw your attention to the fact that in the parlance of Company Law, the two words "member" and "shareholder", are loosely used by common people, thereby giving an impression that they are *absolutely* synonymous. Such an impression needs to be qualified. You will perhaps recollect that a member and a shareholder can be differentiated on the following grounds:

1. A registered member may not be a shareholder, since a company limited by guarantee and not having a share capital, does have members, but not shareholders. But a registered shareholder is a member, since his name appears in the Register of members maintained by the company.
2. A person who owns a share warrant (shares) is not a member since his name does not appear in the Register of members maintained by the company. He is a share- holder only.
3. A legal representative of a deceased member is a shareholder, but not a member, till he applies for registration and his name is entered in the Registrar of members.

(e) Rights of a member: These are as follows:

- (i) To have the certificate of shares held or the certificate of stock issued to him within the prescribed time [Section 56].
- (ii) To have his name borne on the register of members.
- (iii) To transfer shares subject to any restrictions imposed by the articles [Section 44].
- (iv) To attend meetings of shareholders, receive proper notice and to vote at the meetings.
- (v) To associate in the declaration of dividends and to apply to the Court for an injunction restraining the directors from paying dividends on an *ultra vires* declaration or out of capital.

- (vi) To inspect the registers, indexes, returns and copies of certificates, etc. kept by the company and to obtain extracts or copy thereof [Section 13].
 - (vii) To obtain copies of Memorandum and Articles on request on payment of the prescribed fees [Section 17].
 - (viii) To have the first option in case of issue of shares or a further issue of shares (*i.e.*, the right of pre-emption) by the company [Section 62].
 - (ix) To apply to the Court to have any variation or abrogation to his rights set aside by the Court [Section 48].
 - (x) To have notice of any resolution requiring special notice [Section 115].
 - (xi) To obtain on request minutes of proceedings at general meeting [Section 119].
 - (xii) To remove directors by joining with others [Section 169].
 - (xiii) To obtain a copy of the profit and loss account and the balance sheet with the auditor's report [Sections 129 and 136].
 - (xiv) To apply for the appointment of one or more competent inspectors by the Government to investigate into the affairs of the company as well as for reporting thereon [Sections 235 and 237].
 - (xv) To participate in the appointment of an auditor or auditors at the Annual General Meeting [Section 213].
 - (xvi) To inspect the auditor's report at the Annual General Meeting of the company [Section 145].
 - (xvii) To receive a share in the capital of the company and in the surplus assets, if any, on the company's liquidation.
 - (xviii) To participate in passing of the special resolution that the company may be wound up by the Court or voluntarily [Sections 271 and 304].
 - (xix) To participate in appointment and in fixation of remuneration of one or more liquidators in the case of a Member's Voluntary Winding up and to fill any vacancy in the office of a liquidators so appointed by him [Sections 310 and 311].
- (f) Liabilities and duties of a member**
- (i) To take shares, when they are allotted in due time and in compliance with the provisions of the Act, unless the refusal to accept the shares has been sent on the ground of non-compliance with the provisions of the Act as regards the issue of the prospectus or as regards allotment.
 - (ii) To pay for the shares allotted to him when the allotment is made and when calls have been made validly and in conformity with the provisions of the articles.
 - (iii) To abide by the doing of the majority of members unless the majority acts vindictively, oppressively, *mala fide* or fraudulently.

- (iv) to contribute to the assets of the company in the case of winding up when the shares held are partly paid-up.

Example: X purchased 100 equity shares of ABC Ltd. from Y. Though the amount of transaction was paid to the seller, the transferee name is not appearing in the list of members. Subsequently, the company declared dividend. Referring to the provisions of the Companies Act, 1956 state to whom the company will be paying the dividend.

According to section 123 of the Companies Act, 2013 dividend shall be paid only to the registered holder of shares or to his order or to his bankers or to the bearer of a share warrant. Where shares have been sold but not yet registered, the dividend shall be paid to the transferee only in case the transferor gives a mandate in writing to that effect. Otherwise, the dividend in respect of such shares shall be transferred to the 'unpaid dividend account'.

2.26 Contracts

With the extent of knowledge of the company law so far acquired, you will now be able to follow the procedures regarding contracts and deeds, investments, seal etc., which we shall presently deal with.

"A contract to take shares in company is governed by the same rule as any other contract".

There being no difference between a contract to take shares and any other contract, it is not necessary that an agreement to take shares should be formal. If in substance, an agreement is made, the form is immaterial (*Risto's case 4 Ch. D. 782*).

The same rules, which govern the contract under the law of contracts also apply to a contract to take shares. The intending candidate sends in response to a prospectus, his application to the company for such number of shares as he wants to have or as the company may allot to him. It is treated as an offer from the applicant, which needs to be accepted by the company before a binding contract can come into being. The fact of acceptance is then communicated to the applicant through a notice of allotment [*Polatt's case (1867) L.R. 2 Ch. Appl. 527*]. The application for shares or debentures, made in pursuance of a prospectus issued generally, cannot be revoked until after the expiry of the 6th day after the opening of the subscription list, or the giving, before the expiry of the said 5th day by some person responsible under Section 35 for the prospectus, of a public notice having the effect of excluding, limiting or diminishing the responsibility of that person. The applicant, however, can revoke his application, before the notice of allotment is put in the course of transmission to him, *e.g.*, by post [*Maclangan's case (1882) 51 L.J. Ch. 841; Wallance's case, (1920) 2 Ch. 671*]. Where handing over of the notice of allotment to a postman, however, does not constitute its posting (*Re. London & Northern Bank Exp. Jons (1900) 1 Ch. 210*). On proper posting of the notice the contract is complete even if it is lost [*Harri's case, (1872) L.R. 7 Ch. App. 587*]. Again the acceptance must be communicated to the applicant in some way, whether by writing or verbally or conduct

[*Gunn's case*, (1867) by L.R. Ch. App. 40]. Even a notice of allotment brought home to the applicant, not from the company but from elsewhere will be binding on him [*Wall's case* (1863) L.R. 3 Ch. App. 325].

Where shares have been applied for prior to the company's incorporation, allotment and notice after incorporation in response to such application constitute a complete contract. This is because the application operates as a continuing offer and when the company accepts it after incorporation, it matures into a binding contract [*Lawrence's case*, (1866) 2 Ch. App. 413; *Downes vs. Ship* (1868) L.R. 3 H.L. 344].

The aforesaid application may be either simple or conditional. In the former case, a simple allotment to the applicant with the notice thereof will constitute the agreement.

If it is conditional, the allotment must be made in pursuance of the specified conditions [*In Re. Universal Banking Co.*; *Roger's case*; *Harrison's case* (1858) 3 Ch. App. 633]. Where it has been made subject to a condition precedent, the applicant becomes a member only when the condition is complied with. But where the application has been made subject to a collateral condition or a condition subsequent, the applicant becomes a member in present, when he accepts the notice of allotment and his name has been placed on the register of members. Consequently, even if the company goes into liquidation, he cannot escape the liability as contributory, though the condition has not been complied with by the company before that time. He may be entitled to damages against the company for its failure in carrying out the condition [*Elkington's case* (1867) 1 Ch. App. 511; *Fisher's case* (1885) 31 Ch. D. 120]. But since the liability of a contributory arises *ex lege* and not *ex contractu*, he cannot set up the non-fulfilment of the condition as a defence against his statutory liability as a contributory, which is the direct result of his being a member of the company [*Hansraj vs. Astana* 35 Bom. L.R. 012 (P.G.)].

Even where an applicant waives notice of allotment or where there is no necessity for such notice, the contract for shares is nevertheless complete and the allottee becomes entitled to the membership of the company.

Besides, according to Section 2(55), the applicant, by agreeing to take shares, merely agrees to become a member but does not actually become a member; he becomes a member only when his name is entered on the register of members [*Nicol's case* 32 Ch. D. 421; and *Mussel White & Sons Ltd.* (1962) 1 All E.K. 20].

Further, to decree specific performance of a contract by a person to take or a company to allot shares is well within jurisdiction of the Court [*New Burnswick etc. & Land Co. vs. Muggeridge* (1860) Dr. & sm. 363; *Odessa Tramways Co. vs. Monde* (1878) 7 Ch. D. 235].

In view of the foregoing discussion it may thus be concluded that the statement that a "contract to take shares in a company is governed by the same rules as any other contract" is fully correct.

(a) Forms of contract: A company can enter into contracts just like an individual person. Suppose, a contract between private persons requires, for its validity, to be in writing signed by the parties to be charged. A similar contract may be made exactly in the same manner by

any person acting under the authority of the company. Such an authority may be express or implied. Such a contract may be varied or discharged by the authorised representative of the company in the same manner as the one by private persons.

Likewise, where a private person can verbally make a legally valid contract, a company can also do so. The same rule will apply in respect of any variance or discharge of such type of contracts.

It is thus evident that a company can enter into oral contract when writing is not legally necessary as well as a written contract where writing is a 'must'. As a general rule, it is permissible for a company to transact a contract without seal. As long as the contract is made by an expressly or impliedly authorised person on behalf of the company and is signed by him, it would be enough.

(b) Bill of Exchange and Promissory Note and Hundi: The next important question is whether a company can make, accept, endorse, or issue a bill of exchange, promissory note, hundi and such other negotiable instruments. The answer to this query will depend on the conditions laid down in the memorandum. Under Section 22 of the Companies Act, 2013, a bill of exchange, hundi or promissory note shall be deemed to have been made, accepted, drawn or endorsed on behalf of the company if drawn, accepted, made or endorsed in the name of, or on account of, or on behalf of, the company by any person acting under its authority, express or implied.

(c) Execution of deeds: Section 22 says that a company may, by writing under its common seal, authorise any person, either generally or in respect of any specified matters, as its attorney to execute other deeds on its behalf in any place either in or outside India. A deed signed by such an attorney on behalf of the company and under his seal shall bind the company and have the effect as if it were made under its common seal.

Annexure

Sections which is yet to be notified.

Section 75 : Damages for fraud: According to section 75 of the Companies Act, 2013-

(1) Where a company fails to repay the deposit or part thereof or any interest thereon referred to in section 74 within the time specified in sub-section (1) of that section or such further time as may be allowed by the Tribunal under sub-section (2) of that section, and it is proved that the deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, every officer of the company who was responsible for the acceptance of such deposit shall, without effecting to the provisions contained in sub-section (3) of that section and liability under section 447, be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by the depositors.

(2) Any suit, proceedings or other action may be taken by any person, group of persons or any association of persons who had incurred any loss as a result of the failure of the company to repay the deposits or part thereof or any interest thereon.

UNIT – 3 SHARE AND SHARE CAPITAL

Learning Objectives

The share capital is the lifeblood for running the affairs of the company. Sometimes after the issue of capital a company may either alter or reduce the share capital depending upon the exigencies of the situation. For desired share capital, a company may also raise a debenture which have to be registered as a charge. In this unit the following headings are covered:

- ◆ Share capital and shares
- ◆ Rise of shareholders and its variation
- ◆ Alteration and reduction of share capital
- ◆ Issue of shares at a premium and at a discount
- ◆ Transfer and transmission of shares
- ◆ Issue of debentures.
- ◆ Registration of Charges

3.1 Concept of Capital

The term Capital has a variety of meanings. It means one thing to economists; another to accountants and still another to businessmen and lawyers. In relation to a company limited by shares, the word capital means share-capital, *i.e.*, the capital or figure in terms of so many rupees divided into shares of fixed amount. In other words, the contributions of persons to the common stock of the company form the capital of the company. The proportion of the capital to which each member is entitled, is his share. A share is not a sum of money; it is rather an interest measured by a sum of money and made up of various rights contained in the contract.

In the domain of Company Law, the term 'capital' is used in the following senses:

(a) Nominal or authorised or registered capital: This form of capital has been defined in section 2(8) of the Companies Act, 2013. "Authorised capital" or "Nominal capital" means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company. Thus it is the sum stated in the memorandum as the capital of the company with which it is to be registered being the maximum amount which it is authorised to raise by issuing shares, and upon which it pays the stamp duty. It is usually fixed at the amount, which, it is estimated, the company will need, including the working capital and reserve capital, if any.

(b) Issued capital: Section 2(50) of the Companies Act, 2013 defines "issued capital" which means such capital as the company issues from time to time for subscription; It is that part of authorised capital which is offered by the company for subscription and includes the shares allotted for consideration other than cash.

Schedule III of the Companies Act, 2013, makes it obligatory for a company to disclose its

issued capital in the balance sheet.

(c) Subscribed capital: Section 2(86) of the Companies Act, 2013 defines "subscribed capital" as such part of the capital which is for the time being subscribed by the members of a company;

It is the nominal amount of shares taken up by the public. Where any notice, advertisement or other official communication or any business letter, bill head or letter paper of a company states the authorised capital, the subscribed and paid-up capital must also be stated in equally conspicuous characters. A default in this regard will make the company and every officer who is in default liable to pay penalty extending ₹ 10,000 and 5,000 respectively.[Section 60].

(d) Called-up capital: Section 2(15) of the Companies Act, 2013 defines "called-up capital" as such part of the capital, which has been called for payment; It is the total amount called up on the shares issued. Paid-up capital is the total amount paid or credited as paid up on shares issued. It is equal to called up capital less calls in arrears.

3.2 Shares

(a) Nature of shares: Section 2(84) of the Companies Act, 2013 defines the term 'share' which means a share in the share capital of a company and includes stock. A share thus represents such proportion of the interest of the shareholders as the amount paid up thereon bears to the total capital payable to the company. It is a measure of the interest in the company's assets to which a person holding a share is entitled.

Farwell Justice, in *Borland Trustees vs. Steel Bors. & Co. Ltd.*(1901)1Ch279 observed that "a share is not a sum of money but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount". You should note that the shareholders are not, in the eyes of law, part owners of the undertaking. The undertaking is somewhat different from the totality of the shareholders. The rights and obligations attaching to a share are those prescribed by the memorandum and the articles of a company. It must, however, be remembered that a shareholder has not only contractual rights against the company, but also certain other rights which accrue to him according to the provisions of the Companies Act.

The shares or debentures or other interests of any member in a company shall be movable property transferable in the manner provided by the articles of the company [Section 44 of the Companies Act, 2013]. Every share in a company having a share capital, shall be distinguished by its distinctive number [Section 45]. This shall not apply to a share held by a person whose name is entered as holder of beneficial interest in such share in the records of a depository.

(b) Kinds of share capital:- Section 43 of the Companies Act, 2013 provides the kinds of share capital. According to the provision the share capital of a company limited by shares shall be of two kinds, namely:—

- (i) equity share capital—
 - (1) with voting rights; or
 - (2) with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed; and
- (ii) preference share capital:

However this Act shall not affect the rights of the preference shareholders who are entitled to participate in the proceeds of winding up before the commencement of this Act.

The term “**Equity share capital**”, with reference to any company limited by shares, means all share capital which is not preference share capital;

Whereas the term “**Preference share capital**”, with reference to any company limited by shares, means that part of the issued share capital of the company which carries or would carry a preferential right with respect to—

- (a) **payment of dividend**, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and
- (b) **repayment**, in the case of a winding up or repayment of capital, of the amount of the share capital paid-up or deemed to have been paid-up, whether or not, there is a preferential right to the payment of any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company;

Capital shall be deemed to be preference capital, despite that it is entitled to either or both of the following rights, namely:—

- (a) that in **respect of dividends**, in addition to the preferential rights to the amounts specified as above, it has a right to participate, whether fully or to a limited extent, with capital not entitled to the preferential right aforesaid;
- (b) that in **respect of capital**, in addition to the preferential right to the repayment, on a winding up, of the amounts specified above, it has a right to participate, whether fully or to a limited extent, with capital not entitled to that preferential right in any surplus which may remain after the entire capital has been repaid.

Condition for the issue of equity shares with differential rights: As per the Companies (Share Capital and Debentures) Rules, 2014, no company limited by shares shall issue equity shares with differential rights as to dividend, voting or otherwise, unless it complies with the following conditions, namely:-

- (a) the articles of association of the company authorizes the issue of shares with differential rights;
- (b) the issue of shares is authorized by an ordinary resolution passed at a general meeting of the shareholders. Provided that where the equity shares of a company are listed on a recognized stock exchange, the issue of such shares shall be approved by the shareholders through postal ballot.

- (c) the shares with differential rights shall not exceed 26 percent of the total post-issue paid up equity share capital including equity shares with differential rights issued at any point of time;
- (d) the company having consistent track record of distributable profits for the last three years;
- (e) the company has not defaulted in filing financial statements and annual returns for three financial years immediately preceding the financial year in which it is decided to issue such shares;
- (f) the company has no subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due for redemption or payment of interest on such deposits or debentures or payment of dividend;
- (g) the company has not defaulted in payment of the dividend on preference shares or repayment of any term loan from a public financial institution or State level financial institution or scheduled Bank that has become repayable or interest payable thereon or dues with respect to statutory payments relating to its employees to any authority or default in crediting the amount in Investor Education and Protection Fund to the Central Government;
- (h) the company has not been penalized by Court or Tribunal during the last three years of any offence under the Reserve Bank of India Act, 1934, the Securities and Exchange Board of India Act, 1992, the Securities Contracts Regulation Act, 1956, the Foreign Exchange Management Act, 1999 or any other special Act, under which such companies being regulated by sectoral regulators.

Condition for the Issue of preference shares: A company having a share capital may, if so authorised by its articles, issue preference shares subject to the following conditions, namely:-

- (a) the issue of such shares has been authorized by passing a special resolution in the general meeting of the company
- (b) the company, at the time of such issue of preference shares, has no subsisting default in the redemption of preference shares issued either before or after the commencement of this Act or in payment of dividend due on any preference shares.

3.3 Variation of Shareholders Rights

Where share capital of a company is divided into different classes of shares, it may sometimes be necessary for it to amend the rights attached to one or more classes of shares. Its memorandum or articles may authorise the variation of the rights attached to any of the shares. Also, there might be a situation where the memorandum or the articles of the company are silent on the point of variation of shareholder's rights. In either of these circumstances can the company straightway vary the shareholders' rights without undergoing any other formality?

The answer is 'No'. These rights can be varied only if the consent in writing of the holders constituting not less than three-fourths of the issued shares of the concerned class has been taken, or only if the sanction through a special resolution passed at a separate meeting of the holders of the issued shares of that class has been taken prior to the variation of the rights. However, if such variation is prohibited by the terms of the aforesaid class of shares, then the variation will not be possible [Section 106 of the Companies Act, 1956].

You must note that the variation as contemplated by Section 106 is the variation which is to the prejudice of any class of shareholders. That is to say, in case the variation involves curtailment of rights of any class or classes of shareholders, the aforesaid consent or sanction of the said class or classes will be required. If the variation pertains to adding or enhancing right of any classes, then also the compliance with the provisions of Section 106 is necessary. It has been held that a variation which affects only the enjoyment of a right without modifying the right itself does not fall within the purview of Section 106 [*In re Hindustan General Electrical Corporation*, A.I.R. 190 Cul. 672]. Once the variation is effected in strict consonance with the provisions of Section 106, it is complete, no further steps being necessary to adopt it [*In re Ramuria Cotton Mills Ltd.* 53 C.W.N. 11], in the event of the variation of right being a part of a scheme or arrangement with the intervention of the Court under Section 391 (this is excluded from the syllabus), Section 106 will be inapplicable in General Electrical Corporation [*Supra*].

If the minority feels oppressed or prejudiced by the variation as aforesaid, then Section 107 will have to be invoked.

In the light of the above-mentioned provisions, the procedure which is generally followed in regard to variation of rights attached to a particular class of shares is as under:

A meeting of the shareholders, holding the shares of the class, rights attached to which are sought to be altered, is convened. (The quorum for meeting shall be at least 2 persons present in person or by proxy in the case of a private company; in the case of a public company, the number of member present should be 5). If the meeting passes the special resolution then variation can be proceeded with [Section 170(2)(b); Section 174(1)].

Shareholders holding not less than 10 per cent, in the aggregate, of issued shares of that class, being persons who have not consented to or voted for the resolution for the variation of the rights may apply to the Court to have the variation cancelled. The application has to be made within 21 days from the date of passing of the resolution. In the case where an application has been made, the variation shall be effective only after it has been confirmed by the Court. The decision of the Court on any such application shall be final. If the Court has made an order, the company must, within 30 days after the service on the company of any order by it, forward copy of it to the Registrar [Section 107]. It would be worth noting in this context that sub-division of shares is not tantamount to variation.

[Note: The provision related to variation of shareholders' right is covered in section 48 of the Companies Act, 2013 which is not yet notified. Section 106 of the Companies Act, 1956 will be referred here. For Section 48 of Companies Act, 2013 see the annexure].

3.4 Voting Rights of a Member

Section 47 governs the voting rights of members. According to the section, **(i) Voting right of member holding equity share capital:** Every member of a company limited by shares who is holding equity share capital, shall have a right to vote on every resolution placed before the company; and his voting right on a poll shall be in proportion to his share in the paid-up equity share capital of the company.

(ii) Voting right of member holding preference share capital: Every member of a company limited by shares who is holding any preference share capital shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares and, any resolution for the winding up of the company or for the repayment or reduction of its equity or preference share capital and his voting right on a poll shall be in proportion to his share in the paid-up preference share capital of the company.

(iii) Proportion of voting rights: The proportion of the voting rights of equity shareholders to the voting rights of the preference shareholders shall be in the same proportion as the paid-up capital in respect of the equity shares bears to the paid-up capital in respect of the preference shares.

Where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, then such class of preference shareholders shall have a right to vote on all the resolutions placed before the company.

3.5 Further issue of Capital (Right Shares i.e. Right of Pre-emption or Pre-emptive Right)

Sometimes, it may so happen that a company may desire to expand its activities or it may stand in need of more financial resources even in the absence of expansion of activities. In such a situation, it may issue a part or the whole of its unissued share capital. A company can bring out a public issue for equity shares/preferential shares with the consent of existing shareholders who have the pre-emptive right to purchase the additional shares of the company contemplated to be issued under the provisions of Section 62 of the Companies Act, 2013. Under the provisions of the Act, when shares are offered to the existing shareholders, it is called the Right issue.

As per the section 62 of the Companies Act, 2013, where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered—

(a) to persons who, at the date of the offer, **are holders of equity shares** of the company in proportion, to the paid-up share capital on those shares by sending a letter of offer subject to the following conditions, namely:—

- (i) **the offer shall be made by notice** specifying the number of shares offered and limiting a time not being less than fifteen days and not exceeding thirty days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined;
- (ii) **unless the articles of the company otherwise provide**, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person; and the notice referred to in clause (i) shall contain a statement of this right;
- (iii) **after the expiry of the time specified in the notice** aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the Board of Directors may dispose of them in such manner which is not dis-advantageous to the shareholders and the company;
- (b) **to employees under a scheme of employees' stock option**, subject to special resolution passed by company and subject to the conditions as may be prescribed; or
- (c) **to any persons, if it is authorised by a special resolution**, whether or not those persons include the persons referred to in clause (a) or clause (b), either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer subject to such conditions as prescribed under the Rule 13 of the Companies (Share capital and Debentures) Rules, 2014.

As per the Companies (Share Capital and Debenture) Amendment Rules, 2014, dated 18th of June, 2014, after Sub-Rule (2) of rule 13 related to issue of shares on preferential basis, following sub-rule (3) has been inserted stating that the price of shares or other securities to be issued on preferential basis shall not be less than the price determined on the basis of valuation report of a registered valuer."

The notice of offer of shares shall be despatched through registered post or speed post or through electronic mode to all the existing shareholders at least three days before the opening of the issue.

Exception: This section shall not apply to the increase of the subscribed capital of a company caused by the exercise of an option attached to the debentures issued or loan raised by the company to convert such debentures or loans into shares in the company.

Provided that the terms of issue of such debentures or loan containing such an option have been approved before the issue of such debentures or the raising of loan by a special resolution passed by the company in general meeting.

Conversion of debentures/loan into shares: Where any debentures have been issued, or loan has been obtained from any Government by a company, and if that Government considers it necessary in the public interest, it may, by order, direct that such debentures or loans or any part thereof shall be converted into shares in the company on such terms and conditions as appear to the Government to be reasonable in the circumstances of the case even if terms of the issue of such debentures or the raising of such loans do not include a term for providing for an option for such conversion.

Term of conversion not acceptable to the company: Where the terms and conditions of such conversion are not acceptable to the company, it may, within 60 days from the date of communication of such order, appeal to the Tribunal which shall after hearing the company and the Government pass such order as it deems fit.

Points to be taken into consideration for the term of conversion: In determining the terms and conditions of conversion, the Government shall have due regard to the financial position of the company, the terms of issue of debentures or loans, as the case may be, the rate of interest payable on such debentures or loans and such other matters as it may consider necessary.

When memorandum of company stand altered and increases authorized share capital: Where the Government has, by an order directed that any debenture or loan or any part thereof shall be converted into shares in a company and where no appeal has been preferred to the Tribunal or where such appeal has been dismissed, then the memorandum of company shall, by such order having the effect of increasing the authorised share capital of the company, stand altered and the authorised share capital of such company shall stand increased by an amount equal to the amount of the value of shares which such debentures or loans or part thereof has been converted into.

3.6 Conversion of Shares into Stock

"Stock" is an aggregate of fully paid shares that have been *legally* consolidated. The consolidated amount is divisible into fractions of any amount, regardless of the nominal value of the shares that have been consolidated. It thus represents a part of the capital of the company which is fully paid.

By virtue of the powers contained in Section 61 of the Companies Act, 2013 a company limited by shares if authorised by its articles, may by means of a resolution passed at a general meeting alter the conditions of its memorandum with a view to converting all or any of its fully paid shares into stock and also reconvert its stock into shares. However, the company cannot issue stock *ab initio*. It must issue shares and after they are fully paid up, convert them into stock.

So, section 64 of the Companies Act, 2013 seeks to provide for the companies to give notice to the registrar of alteration or increase of share capital along with an altered memorandum.

(1) Notice with the registrar: Where—

- (a) a company alters its share capital in any manner specified in section 61(1).
- (b) an order made by the Government under section 62 has the effect of increasing authorised capital of a company; or
- (c) a company redeems any redeemable preference shares,

the company shall file a notice in the prescribed form with the Registrar within a period of 30 days of such alteration or increase or redemption, as the case may be, along with an altered memorandum.

- (2) **Punishment in contravention of the provision:** If a company and any officer of the company who is in default contravenes the above provision, then the company or the officer shall be punishable with fine which may extend to 1,000 rupees for each day during which such default continues, or 5 lakh rupees, whichever is less.

3.7 Alteration of Share Capital

According to section 61 of the Companies Act, 2013 following points related to the share capital may be altered. The law given in the provision provides that a limited company having a share capital may alter its capital part of the memorandum.

- (1) According to the provision a limited company having a share capital may, if so authorised by its articles, alter its memorandum in its general meeting to—
- (a) **increase its authorised share capital** by such amount as it thinks expedient;
 - (b) **consolidate and divide** all or any of its share capital into shares of a larger amount than its existing shares, however no consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner.
 - (c) **convert all or any of its fully paid-up shares into stock**, and reconvert that stock into fully paid-up shares of any denomination;
 - (d) **sub-divide its shares**, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived.
 - (e) **cancel shares** which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.
- (2) The cancellation of shares shall not be deemed to be a reduction of share capital.

Within 30 days of the shares having been consolidated, converted, sub-divided, redeemed, or cancelled or the stock having been reconverted, notice should be given to the Registrar in the prescribed form along with an altered memorandum [Section 64 of the Companies Act, 2013].

3.8 Reduction of the Share Capital

It is to the capital of the company which members have invested or undertaken to invest and the assets represented thereby, that creditors look for the satisfaction of their claims. This has, therefore, been the principle, of the Company Law that share capital shall be reduced only subject to special safeguards.

Section 100 of the Companies Act, 1956 provides that a company, limited by shares or guarantee and having share capital, if so *authorised by the articles, may by special resolution and the confirmation of the Court*, reduce its share capital in any way and in particular by:

- (a) extinguishing or reducing the liability of members in respect of the capital not paid up;
- (b) writing off or cancelling any paid-up capital which is lost, or is not represented by available asset;
- (c) paying off any paid-up share capital which is in excess of the needs of the company .

Reduction in (b) and (c) may be made either in addition or without extinguishing or reducing the liability of the members for uncalled capital.

Reduction of share capital may in reality take three forms, namely, (i) reducing the value of shares in order to absorb the accumulated losses suffered by the company without any payment to the shareholders ; (ii) extinction of liability of capital not paid ; and (iii) paying off any paid-up share capital. Only in the circumstances referred to in point (ii) and (iii) the interest of creditors really involved.

[Note: This section of the Companies Act, 1956 is to be replaced by the section 66 of the Companies Act, 2013 which deals with the reduction of share capital. This section is not yet notified. For reference see the annexure]

3.9 Reduction of Share Capital vs. Diminution of Share Capital

Section 100 of the Companies Act, 1956 provides for the reduction of capital. For this, the articles must give the authority; it is not enough to provide for it in the memorandum. If the articles do not so authorise, then these must be altered by a special resolution first and thereafter a second special resolution will have to be passed to reduce the capital in the manner proposed. Reduction of capital may be a reduction in the nominal capital, reduction at the same time in issued capital, a reduction in the paid-up capital or in the capital that has been issued but not paid up (*e.g.* where an uncalled liability is cancelled).

The term "diminution" denotes a cancellation of that portion of the issued capital which has not been subscribed for. Section 61 of the 2013 Act states it, the cancellation of "shares which at the date of the passing of the resolution in that behalf have not been taken or agreed to be taken by any person".

Section 61 of the Companies Act, 2013 specifically states that diminution does not constitute a reduction within the meaning of the Companies Act. The expression "diminution of share capital" and "reduction of share capital" differ from each other in the following respects.

- (1) Reduction may involve reduction *inter alia* of issued capital, whereas diminution may be in respect of authorised capital but not of issued capital.
- (2) If the articles authorise the procedure, diminution can be effected by an ordinary resolution, while reduction (which also need authorisation by articles), can be effected only by a special resolution.

- (3) Diminution needs no confirmation by the Court [Section 61 of the Companies Act, 2013], but reduction needs such confirmation [Section 101 of the Companies Act, 1956].
- (4) Where a company is ordered to add to its name the words "and reduced" these words shall until the expiry of the period specified in the order, be deemed to be part of the company's name [Section 102(3) of the Companies Act, 1956], but such a provision does not exist in the case of diminution of the share capital as envisaged in Section 61.
- (5) In the case of diminution, notice is to be given to the Registrar within 30 days from the date of cancellation whereupon the Registrar shall record the notice and make the necessary alteration in the memorandum or articles or both [Section 64 of the Companies Act, 2013]; whereas in the case of reduction more detailed procedure regarding notice to the Registrar has been prescribed by Section 103 of the Companies Act, 1956, though there is no such time limit as aforesaid (*i.e.* 30 days).

3.10 Issue of Shares at a Discount

A company cannot issue shares in disregard of Section 53 of the Companies Act, 2013. According to section 53, a company shall not issue shares at a discount, except in the case of an issue of sweat equity shares given under section 54 of the Companies Act, 2013.

Any share issued by a company at a discounted price shall be void. Where a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees and every officer who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

3.11 Issue of Sweat Equity

Section 2(88) of the Companies Act, 2013 defines the term "sweat equity shares" which means such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.

A company other than a listed company, which is not required to comply with the Securities and Exchange Board of India Regulations on sweat equity, shall not issue sweat equity shares to its directors or employees at a discount or for consideration other than cash, for their providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called, unless the issue is authorised by a special resolution passed by the company in general meeting.

Here the term "Employee" means-

- (a) a permanent employee of the company who has been working in India or outside India, for at least last one year; or
- (b) a director of the company, whether a whole time director or not; or
- (c) an employee or a director as defined in sub-clauses (a) or (b) above of a subsidiary, in India or outside India, or of a holding company of the company;

Whereas, the expression 'Value additions' means actual or anticipated economic benefits derived or to be derived by the company from an expert or a professional for providing know-how or making available rights in the nature of intellectual property rights, by such person to whom sweat equity is being issued for which the consideration is not paid or included in the normal remuneration payable under the contract of employment, in the case of an employee.

The section 54 of the Companies Act, 2013 provides the conditions where a company may issue sweat equity shares of a class of shares already issued.

Conditions: A company may issue sweat equity shares of a class of shares already issued, if the following conditions are fulfilled, namely:—

- (a) the issue is **authorised by a special resolution** passed by the company;
- (b) the **resolution specifies** the number of shares, the current market price, consideration, if any, and the class or classes of directors or employees to whom such equity shares are to be issued;
- (c) **not less than one year has**, at the date of such issue, **elapsed** since the date on which the company had commenced business; and
- (d) where the equity shares of the company are **listed on a recognised stock** exchange, the sweat equity shares are issued in accordance with the regulations made by the Securities and Exchange Board in this behalf and if they are not so listed, the sweat equity shares are issued in accordance with such rules as may be prescribed.

The rights, limitations, restrictions and provisions as are for the time being applicable to equity shares shall be applicable to the sweat equity shares issued under this section and the holders of such shares shall rank *pari passu* with other equity shareholders.

3.12 Issue of Securities at a Premium

Section 52 of the Companies Act, 2013 provides that a company shall transfer the amount received by it as securities premium to securities premium account and state the means in which the amount in the account can be applied.

According to the section where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the premium received on those shares shall be transferred to a "securities premium account" and the provisions of this Act relating to reduction of share capital of a company shall apply as if the securities premium account were the paid-up share capital of the company.

Application of securities premium account: The securities premium account may be applied by the company—

- (a) towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares;
- (b) in writing off the preliminary expenses of the company;
- (c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;
- (d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or
- (e) for the purchase of its own shares or other securities under section 68.

Who may apply the securities premium account: The securities premium account may be applied by such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133,—

- (a) in paying up unissued equity shares of the company to be issued to members of the company as fully paid bonus shares; or
- (b) in writing off the expenses of or the commission paid or discount allowed on any issue of equity shares of the company; or
- (c) for the purchase of its own shares or other securities under section 68.

There is no provision in the Act, which can prevent a company from issuing securities at a premium, *e.g.*, ₹ 100 securities at the price of ₹ 125. However, SEBI Regulation prescribes, classes of companies which can price their issues at par or at premium. This is subject to conditions applicable for promoters contribution and lock-in Period. Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of value of the premium on those securities must be transferred to an account described as “securities premium account”. The word ‘amount’ refers to a cash premium and the word ‘value’ to a premium other than cash. Securities issued for a consideration other than cash will be treated as having been issued at a premium if the value of the assets in consideration of which they are issued is more than the nominal value of the securities. Where a holding company, formed for the purpose of amalgamating two existing companies, acquires assets of a greater value than the nominal value of the shares issued by it in exchange for the existing securities of the amalgamated companies, it is required to transfer the excess value of the assets acquired to its securities premium account [*Head Henry & Co. vs. Ropner Holdings Ltd. [1951] 1 All E.R. 944*]. Thus, it is clear that a company can issue securities at a premium also for a consideration other than cash.

There is no prohibition in the Act against issue of securities at differential premium. The value which the acquirer of securities may pay in excess of the par value for acquiring the shares, depends upon the contract between the company and the acquirer of such securities [*CIT vs. Standard Vacuum Oil Company AIR [1966] SC 1363*].

3.13 Share Certificate

A share certificate is a document showing title issued by the company declaring that the person named therein is the owner of a specified number of shares in the capital of the company.

Prima facie evidence of title: According to the section 46 of the Companies Act, 2013, it is a certificate, issued under the common seal of the company, specifying the shares held by any person, shall be prima facie evidence of the title of the person to such shares.

A duplicate certificate of shares may be issued, if such certificate —

- (a) is proved to have been lost or destroyed; or
- (b) has been defaced, mutilated or torn and is surrendered to the company.

The manner of issue of a certificate of shares or the duplicate thereof, the form of such certificate, the particulars to be entered in the register of members and other matters shall be such as may be prescribed.

Where a share is held in depository form, the record of the depository is the prima facie evidence of the interest of the beneficial owner.

If a company with intent to defraud issues a duplicate certificate of shares, the company shall be punishable with fine which shall not be less than five times the face value of the shares involved in the issue of the duplicate certificate but which may extend to ten times the face value of such shares or rupees 10 crores whichever is higher and every officer of the company who is in default shall be liable for action under section 447.

Implications of a share certificate: The issue of a share certificate by the company creates an estoppel as to title and also as to payment.

- (i) **Estoppel as to title:** The company cannot deny the truth of the certificate as against a person who has relied upon it and who, in consequence, has changed his position. But if an officer of the company, who has no authority to issue certificates, issues a forged certificate, then there is no estoppel [*Rubben vs. Great Fingal Consolidated* [1906] A.C. 439; *South London Greyhound Racecourses Ltd. vs. Wake* 1931 Ch. 496].
- (ii) **Estoppel as to payment:** Where a company states that shares are fully paid up, it cannot later contend that they were not, unless the person relying upon the certificate knew that the shares were not in fact fully paid up [*Bloomenthal vs. Ford* [1897] A.C. 156]. It has also been held in another case that the bona fide holder of the share certificate, who had no notice that the shares were not actually paid up fully, could sell those shares away as fully paid to a person who knew that they were not fully paid so as to give the latter a good title to shares as fully paid because the latter derived title from the transferor who had a good title [*Gulabdas's* [1982] 17 Bom 672].

A certificate, however, does not confirm the existence of an equitable interest in the share and as such, the company owes no obligation to a person who holds such an interest. The title of mortgagee, with whom a share certificate and bank transfer have been deposited, may be defeated by the borrower selling all the shares and procuring the registration of the purchaser by obtaining a duplicate certificate. The purchaser in such cases would obtain priority over the mortgagee, since the mortgagee would have no remedy against the company [*Reinford vs. James Keith Blackman and Co.* [1905] 1 Ch. 296].

Section 46 provides that a certificate under the common seal of the company, which specifies any shares by any member shall be *prima facie* evidence of the title of the member to such shares. The certificate is the *prima facie* evidence of the title of the member, specified in the certificate, to certain shares mentioned therein. To the shareholder this evidence is useful in so far as it enables him to prove his title to any shares that he might be desiring to transfer, pledge, or charge. A share certificate, however cannot be described as "share". It is just *prima facie* evidence of the title to a share or shares represented by the certificate [*Gopal Paper Mills Ltd. vs. CIT Central Calcutta* [1966] 1 Com. L.J. 1 174].

Section 46(2) provides that a company may renew or issue a duplicate certificate if it is proved to have been lost or destroyed or having been defaced, mutilated or torn, after the certificate is surrendered to the company. Section 46(3) makes it obligatory for companies to follow the rules prescribed by Government in regard to the following matters:

- (i) The manner of issue or renewal of a certificate or issue of a duplicate thereof.
- (ii) The form of a certificate (original or renewed or a duplicate thereof).
- (iii) The particulars to be entered in the Register of Members or in the register of renewed or duplicate certificate.
- (iv) The form of such registers.

Penalty for impersonation of shareholders: If any person deceitfully personates as an owner of any security or interest in a company, or of any share warrant or coupon issued and thereby obtains or attempts to obtain any such security or interest or any such share warrant or coupon, or receives or attempts to receive any money due to any such owner, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

3.14 Calls on Shares

A 'call' may be defined as a demand made by a company on its shareholders to pay the whole or a part of the balance, remaining unpaid on each share at any time during the continuance of a company

According to section 49 of the Companies Act, 2013, where any calls for further share capital are made on the shares of a class, such calls shall be made on a uniform basis on all shares falling under that class. Here the shares of the same nominal value on which different amounts

have been paid-up shall not be deemed to fall under the same class.

Where as section 50 of the Companies Act, 2013 says that a company may, if so authorised by its articles, accept from any member, the whole or a part of the amount remaining unpaid on any shares held by him, even if no part of that amount has been called up.

In the case of a member of the company limited by shares, he shall not be entitled to any voting rights in respect of the amount paid by him until that amount has been called up.

(a) Rules for making calls: The Board of Directors alone is empowered to make a call. The power cannot be delegated to a director or to a committee of directors or to any other officer of the company (Section 179 of the Companies Act, 2013). A call on the shares falling under the same class must be made on a uniform basis. Shares of the same nominal value, on which different amounts have been paid up, are not deemed to fall under the 'same class' (Section 49). The Board's resolution making the call must specify the amount of call per share and the time allowed for its payment.

(b) Payment of calls in advance: But before we conclude our discussion on calls we have also to know how payment in advance of calls is treated by a company. A company may, if so authorised by the articles, accept from any member the whole or a part of the amount remaining unpaid of any shares by him although no part of that amount has been called up [Section 50, the Companies Act, 2013]. The amount so received or accepted is described as payment in advance of calls. When a company receives payment in advance of calls, the consequences will be as follows:

- (i) The shareholder is not entitled to voting rights in respect of the moneys so paid by him until the same would, but for such payment, become presently payable [Section 50].
- (ii) The shareholder's liability to the company in respect of the call for which the amount is paid is extinguished.
- (iii) The shareholder is entitled to claim interest on the amount of the call to the extent payable according to articles of association. If there are no profits, it must be paid out of capital, because shareholder becomes the creditor of the company in respect of this amount.
- (iv) The amount received in advance of calls is not refundable.
- (v) In the event of winding up the shareholder ranks after the creditors, but must be paid his amount with interest, if any before the other shareholders are paid off.
- (vi) The power to receive the payment in advance of calls must be exercised in the general interest and for the benefit of the company (*Syke's case (1872) L.R. 13 Eq. 255*).

3.15 Transfer of Securities

Transfer of shares means the voluntary conveyance of the rights and possibly, the duties of a member (as represented in a share in the company) from a shareholder who wishes to cease to be a member to a person desirous of becoming a member. Thus, shares in a company are

transferable like any other moveable property in the absence of express restrictions under the articles.

Section 56 of the Companies Act, 2013 deals with the transfer and transmission of securities or interest of a member in the company.

Requirement for registering the transfer of securities: According to the law, a company shall not register a transfer of securities of the company, or the interest of a member in the company in the case of a company having no share capital, unless a proper instrument of transfer, in such form as may be prescribed, duly stamped, dated and executed by or on behalf of the transferor and the transferee (except where the transfer is between persons both of whose names are entered as holders of beneficial interest in the records of a depository), specifying the name, address and occupation, if any, of the transferee, has been delivered to the company by the transferor or the transferee within a period of 60 days from the date of execution, along with the certificate relating to the securities, or if no such certificate is in existence, along with the letter of allotment of securities.

Instrument of transfer lost/ not delivered: Where the instrument of transfer has been lost or the instrument of transfer has not been delivered within the prescribed period, the company may register the transfer on such terms as to indemnity as the Board may think fit.

Power of company to register : Power of company to register shall not be effected by above provision (given under sub- section 1) on receipt of an intimation of transmission of any right to securities by operation of law from any person to whom such right has been transmitted.

Transmission of securities on an application of transferor alone: Where an application is made by the transferor alone and relates to partly paid shares, the transfer shall not be registered, unless the company gives the notice of the application, in such manner as may be prescribed, to the transferee and the transferee gives no objection to the transfer within two weeks from the receipt of notice.

Company delivering the certificate: Every company shall, unless prohibited by any provision of law or any order of Court, Tribunal or other authority, deliver the certificates of all securities allotted, transferred or transmitted—

Different conditions	Period of the delivering the certificates
In the case of subscribers to the memorandum;	Within 2 months from the date of incorporation
In the case of any allotment of any of its shares	Within a period of two months from the date of allotment
In the case of a transfer or transmission of securities	Within a period of one month from the date of receipt by the company of the instrument of transfer or the intimation of transmission

In the case of any allotment of debenture	Within a period of six months from the date of allotment
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Provided that where the securities are dealt with in a depository, the company shall intimate the details of allotment of securities to depository immediately on allotment of such securities.

Transfer of security of the deceased: The transfer of any security or other interest of a deceased person in a company made by his legal representative shall, even if the legal representative is not a holder thereof, be valid as if he had been the holder at the time of the execution of the instrument of transfer.

Default in compliance of the provisions: Where any default is made in complying with the provisions of sub-sections (1) to (5), the company shall be punishable with fine varying from 25,000 rupees to 5 lakh rupees and every officer of the company who is in default shall be punishable with fine with the minimum of 10 thousand rupees extending to 1 one lakh rupees.

Liability of depository: Where any depository or depository participant, with an intention to defraud a person, has transferred shares, it shall be liable under section 447 of the Companies Act, 2013 with the liability mentioned under the Depositories Act, 1996.

3.16 Nomination Facility in respect of Shares

As per the provision given under the section 72 of the Companies Act, 2013, every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.

Where the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.

Nominees to be the holder of the securities: Where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

Where the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority.

3.17 Refusal to Register Transfer and Appeal against Refusal

Section 58 of the Companies Act, 2013, deals with process of the company to be followed by on refusal to register the transfer of securities.

(i) If a private company limited by shares refuses, to register the transfer of, or the

transmission of the right to any securities or interest of a member in the company, then the company shall send notice of the refusal to the transferor and the transferee or to the person giving intimation of such transmission, within a period of thirty days from the date on which the instrument of transfer, or the intimation of such transmission, was delivered to the company.

The securities or other interest of any member in a public company are freely transferable, subject to the contract/arrangement.

(ii) The transferee may appeal to the Tribunal against the refusal within a period of thirty days from the date of receipt of the notice or in case no notice has been sent by the company, within a period of sixty days from the date on which the instrument of transfer or the intimation of transmission, was delivered to the company.

(iii) If a public company without sufficient cause refuses to register the transfer of securities within a period of thirty days from the date on which the instrument of transfer or the intimation of transmission, is delivered to the company, the transferee may, within a period of sixty days of such refusal or where no intimation has been received from the company, within ninety days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal.

(iv) The Tribunal, while dealing with an appeal may, after hearing the parties, either dismiss the appeal, or by order—

(a) *direct that the transfer or transmission shall be registered by the company* and the company shall comply with such order within a period of ten days of the receipt of the order; or

(b) *direct rectification of the register* and also direct the company to pay damages, if any, sustained by any party aggrieved.

(v) If a person contravenes the order of the Tribunal he shall be punishable with imprisonment for a term not less than one year but may extend to three years and with fine not less than one lakh rupees which may extend to five lakh rupees.

As the sections 58 and 59 of the Companies Act, 2013 provide for certain powers of the Tribunal which deal with hearing of an appeal against the refusal of registration or rectification of name of members in the register of members of a company respectively.

And the constitution of the Tribunal following the procedure specified under Chapter XXVII of the said Act is likely to take some time. In order to remove difficulties in compliance with the provisions of section 58 and section 59 of the Companies Act, 2013 in so far as they relate to exercise of certain powers by the Tribunal during the period it is duly constituted under the said Act. The Ministry of Corporate Affairs issued an order called as, the Companies (Removal of Difficulties) Order, 2013 on 20th September, 2013. By this order Ministry clarified that until a date is notified by the Central Government under section 434(1) of the Companies Act, 2013 for transfer of all matters, proceedings or cases to the Tribunal constituted under the Companies Act, 2013, till the time the Board of Company Law Administration shall exercise the

powers of the Tribunal under sections 58 and section 59 in pursuance of the second proviso to section 465(1) of the Companies Act, 2013.

3.18 Rectification of register of members on transfer of securities

Section 59 of the Companies Act, 2013 provides the procedure for the rectification of register of members after the transfer of securities. The provision states that-

(i) **Remedy to the aggrieved for not carrying the changes in the register of members:** If the name of any person is, without sufficient cause, entered in the register of members of a company, or after having been entered in the register, is, omitted there from, or if a default is made, or unnecessary delay takes place in entering in the register, the fact of any person having become or ceased to be a member, the person aggrieved, or any member of the company, or **the company may appeal in such form as may be prescribed, to the Tribunal**, or to a competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the register.

(ii) **Order of the Tribunal:** The Tribunal may, after hearing the parties to the appeal by order, either dismiss the appeal or direct that the transfer or transmission shall be registered by the company within a period of ten days of the receipt of the order, or direct rectification of the records of the depository or the register and in the latter case, direct the company to pay damages, if any, sustained by the party aggrieved.

(iii) The provisions of this section shall not restrict the right of a holder of securities, to transfer such securities and any person acquiring such securities shall be entitled to voting rights unless the voting rights have been suspended by an order of the Tribunal.

(iv) **Where the transfer of securities is in contravention of any of the provisions of the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992** or this Act or any other law for the time being in force, there the Tribunal may, on an application made by the depository, company, depository participant, the holder of the securities or the Securities and Exchange Board, direct any company or a depository to set right the contravention and rectify its register or records concerned.

(v) **Default in complying with the order:** If any default is made in complying with the order of the Tribunal under this section, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.

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Companies Act, 2013, till the time, the Board of Company Law Administration shall exercise the powers of the Tribunal under section 59 in pursuance of the second proviso to section 465(1) of the Companies Act, 2013.

3.19 Blank Transfers

A blank transfer is an instrument of transfer signed by the transferor in which the name of the transferee and the date of the transfer are not filled. But why blank transfer at all? You know that the ownership of shares in a company is generally transferred from one person to another by the execution of a document by the seller and the buyer. This document is variously described as a 'transfer instrument' or 'transfer deed' or simply 'transfer'. But in a blank transfer, the seller only fills in his name and sign it. Neither the buyer's name and signature nor the date of sale is filled in the transfer form. This will enable the buyer to sell the shares again to a subsequent buyer without filling his name and signature. The process of purchase and sale can be repeated any number of times with the blank deed and any transferee can fill in his name and date and get it registered in the company's book. For such ultimate transfer and registration, the first seller will be treated as the transferor.

A blank transfer deed is not a negotiable instrument merely because it may be transferred by mere delivery. Accordingly, the title of the transferee acquiring shares through a blank transfer shall invariably be subject to the title of the transferor. Thus, the bonafide transferee from a person who has acquired a blank transfer deed by fraud does not acquire good title to the shares included in the deed.

The widespread practice of blank transfers which was prevalent before the Companies Act, 2013, lent itself to certain abuses, the most important of which were: (1) avoidance of transfer stamps; (2) concealment of the identity of the real beneficial owners behind their nominees; (3) evasion of tax by suppression of 'secret' profit invested in holdings on blank transfers.

3.20 Forged Transfers

A forged transfer is a nullity. It does not give the transferee concerned any title to the shares. If the company acts on a forged transfer and removes the name of the real owner from the register of Members then the company is bound to restore the name of the real owner on the register as the holder of the shares and to pay him any dividends which he ought to have received [*Barton vs. North Staffordshire Railway Co.* 38 Ch. D. 456. *People Insurance Co. Ltd. vs. Wood & Co. Ltd.* (1961) 31 Comp. Case. 63].

Thus, if by forgery, a person obtains a certificate of transfer of shares from a company and transfers the shares to a purchaser for value acting in good faith *i.e.* without the knowledge of the forgery, such purchaser does not get a good title to the shares so transferred, because a forged transfer is a nullity and cannot be a source of a valid transfer of title. But the company shall be liable to compensate the purchaser in so far as the company had issued a certificate to transfer and was therefore estopped from denying the liability accruing from its own act. The innocent purchaser for value acting upon the faith of the certificate issued by the company

could validly and reasonably assume that the person named in the certificate as the owner of shares was really the owner of the shares represented by the certificate [*Balkis Consolidated Co. vs. Tamkinson* (1982) A.C. 1961]. If as a result of the forged transfer, the name of the true owner of shares is taken off the Register of Members he can compel the company to restore his name to the register. He can also claim any dividend which may not have been paid to him during the intervening period [*Barton vs. North Staffordshire Supra*]. Likewise the transferee must take care that he is not getting a certificate from the company on a forged transfer, because in that case the transferee shall be liable to indemnify the company against the consequences of the damages which may have to be paid by the company to the true owner of the shares [*Sheffield Corporation vs. Barclay* (1905) B.C. 393]. The person who even without any negligence brings about a transfer is liable to indemnify the company against its liability to the owner of shares whose name was taken off from the register as a result of the forged transfer [*Sheffield Corporation vs. Barclay (supra)*; *Starkey vs. Bank of England* (1903) A.C. 104].

3.21 Transmission of Shares

It takes place when shares are transferred under the operation of law, either on the death of the registered shareholder or on his being adjudged as insolvent. It also takes place where the holder is a company if it goes into liquidation. Upon the death, the shares of the deceased vest in his executors or administrators and the estate becomes liable for calls if the shares are not fully paid up. In the like manner the official assignee or the receiver, as the case may be, is also entitled to be registered as a member in the place of shareholder who has been adjudged an insolvent [*R.W. Key and Sons* (1902) 1 C, 467]. However, the executors or administrators may decline to be registered as members for various reasons. In that event the legal representatives, by virtue of Section 56 of the Companies Act, 2013, shall be entitled to transfer the shares of the deceased irrespective of whether they are partly paid or fully paid. Similarly, the official assignee has the statutory power to transfer the shares under Section 58(1) of the Presidency Towns Insolvency Act.

In case legal representative elects to become a member, he must send a written and signed notice called "Letter of Request" to the company notifying his decision. If he elects to transfer, he shall notify the election after executing a transfer of the shares. All rules relating to the right of transfer and registration of transfer will apply to such notice and transfer.

The distinction between transfer and transmission, thus, is that the former is the effect of deliberate act of a member whereas the latter is the result of operation of law on the death or insolvency of a member. Again unlike a transfer in the case of the transmission of shares, an execution of any instrument of transfer is not required. Transmission is recorded by the company on the basis of evidence showing the entitlement of the transferee the shares. No stamp duty is payable on transmission of shares.

3.22 Forfeiture and Surrender of Shares

Forfeiture is the remedy for non-payment of calls or instalments of call or other sums as premiums due in respect of shares. Such a power can be exercised only if the articles expressly so provide and the procedure laid down there under is strictly adhered to. The effect of the forfeiture of a member's share is that he ceases to be a member. If the shares are partly paid, then he is discharged from the liability as shareholder to pay the balance of the amount due on the shares. (But the articles may reserve the liability in respect of sums already called up but not yet paid by him, in which case this creates new liability and he will be liable to these sums as an ordinary debtor and not as a shareholder). Limitation begins to run from the date of forfeiture.

You have already noted that a company can forfeit shares for non-payment of calls only if it has taken power (most companies do so take) in the articles for the purpose. Further, in *Naresh Chandra Sanyal v. Calcutta Stock Exchange Association Ltd.* [1971] *Comp. case 51 (S.C.)*, the shares of the stock broker of the Exchange were forfeited for not carrying out his commitment with his client. In this case it has been held that forfeiture of shares of non-compliance with any other engagement than to pay calls is also valid, provided the articles stipulate so. Nonetheless directors should exercise this power carefully, for in the case of any irregularity, the dispossessed shareholder may have the forfeiture annulled. The power of forfeiture is required to be exercised *bona fide*, in the interest of the company; it must not be collusive or fraudulent.

A duly verified declaration in writing that the declarant is a director, the manager or the secretary of the company and that a share in the company has been duly forfeited on a date stated in the declaration shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the shares.

The articles of companies, however, often empower the directors to accept the surrender of shares. Courts too recognise in on the principle that it relieves the directors of the necessity to go through the formality relating to forfeiture. Although surrender and forfeiture have almost the same effect, yet they differ from each other. Surrender is effected with the assent of the shareholder, whereas forfeiture is a proceeding in invitum (*i.e.*, against a reluctant shareholder) [*Trevor vs. White-work* (1887) 12 App. Case. 417]. But a surrender of shares not fully paid can only be accepted where forfeiture would be justified [*Bellerly and Rawland and Marwoods Steamship Co.* (1902) 2 Ch. 14].

Where the company pays any consideration for the surrender of partly paid up shares, the surrender will be invalid, in as much as it will amount to purchase by the company of its own shares. Unless there are special circumstances, *e.g.*, where the surrender is a part of compromise. Every surrender of shares, whether or not fully paid up, involves reduction of capital, which is unlawful without the sanction of the Court.

Thus, it may be right to say that surrender of shares in a company is a shortcut to forfeiture.

3.23 Issue of bonus shares

This is a new section introduced by the Companies Act, 2013. This section 63 of the Companies Act, 2013 deals with the condition and the manner of issue of fully paid-up bonus shares by a company to its members.

(1) Section 63 says that a company may issue fully paid-up bonus shares to its members, in any manner whatsoever, out of—

- (i) its free reserves;
- (ii) the securities premium account; or
- (iii) the capital redemption reserve account:

Provided that no issue of bonus shares shall be made by capitalising reserves created by the revaluation of assets.

(2) No company shall capitalise its profits or reserves for the purpose of issuing fully paid-up bonus shares unless—

- (a) it is authorised by its articles;
- (b) it has, on the recommendation of the Board, been authorised in the general meeting of the company;
- (c) it has not defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it;
- (d) it has not defaulted in respect of the payment of statutory dues of the employees, such as, contribution to provident fund, gratuity and bonus;
- (e) the partly paid-up shares, if any outstanding on the date of allotment, are made fully paid-up;
- (f) it complies with such conditions as may be prescribed.

(3) The bonus shares shall not be issued in lieu of dividend.

It can only be done if the articles of the company contain provisions in regard thereto. It means that profits which otherwise are available for distribution among the members, are not divided among them in cash, but the shareholders are allotted further shares (bonus shares). Capital profits, shares premium and capital redemption reserve account can also be used for the purpose of issuing fully paid bonus shares.

According to the proviso to Section 123(5) of the Companies Act, 2013, it is permissible for a company to capitalise its profits or reserves for the purpose of issuing fully paid up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company.

3.24 Debentures

Section 2(30) of the Companies Act, 2013 defines the term “debenture” which includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not. Debentures are bonds issued in acknowledgement of any indebtedness. Generally, however, they are issued under the company's seal and contain a provision for the repayment of principal sum at the appointed date and the payment of interest at fixed rate. Debentures are usually secured upon the company's property or undertaking.

Thus, a debenture is an instrument which is drawn under the seal of the company; it binds the company to pay a sum of money at a fixed time with interest but the debenture stock is a debt which carries interest at a fixed rate; it is constituted generally by a deed of covenant with trustees and the stockholder obtains a certificate of title. A stock is called perpetual if the principal amount of debt is not payable at any fixed time but only in the case of winding up or in case of default in paying interest.

Section 71 of the Companies Act, 2013 provides the manner in which a company may issue debentures.

(1) **Issue of debentures with an option to convert:** A company may issue debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption. Provided that the issue of debentures with an option to convert such debentures into shares, wholly or partly, shall be approved by a special resolution passed at a general meeting.

(2) No company shall issue any debentures carrying any voting rights.

(3) *Secured debentures may be issued by a company subject to such terms and conditions prescribed under the Companies (Share Capital and Debentures) Rules, 2014.*

(a) An issue of secured debentures may be made, provided the date of its redemption shall not exceed ten years from the date of issue.

As per the ‘the Companies (Share Capital and Debentures) Amendment Rules, 2014 following proviso has been amended-

“Provided that the following classes of companies may issue secured debentures for a period exceeding ten years but not exceeding thirty years,

- (i) Companies engaged in setting up of infrastructure projects;*
- (ii) ‘Infrastructure Finance Companies’ as defined in clause (viia) of sub-direction (1) of direction 2 of Non-Banking Financial (Non-deposit accepting or holding) Companies Prudential Norms (Reserve Bank) Directions, 2007;*

(iii) *'Infrastructure Debt Fund Non-Banking Financial companies' as defined in clause (b) of direction 3 of Infrastructure Debt Fund Non-Banking Financial Companies (Reserve Bank) Directions, 2011".*

(b) such an issue of debentures shall be secured by the creation of a charge, on the properties or assets of the company, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon;

(c) the company shall appoint a debenture trustee before the issue of prospectus or letter of offer for subscription of its debentures and not later than sixty days after the allotment of the debentures, execute a debenture trust deed to protect the interest of the debenture holders ; and

(d) the security for the debentures by way of a charge or mortgage shall be created in favour of the debenture trustee on-

(i) any specific movable property of the company (not being in the nature of pledge); or

(ii) any specific immovable property wherever situate, or any interest therein.

(4) **Creation of debenture redemption reserve (DRR) account:** Where debentures are issued by a company under this section, the company shall create a debenture redemption reserve account out of the profits of the company available for payment of dividend and the amount credited to such account shall not be utilised by the company except for the redemption of debentures.

As per the Companies (Share Capital and Debentures) Rules, 2014, the company shall create a Debenture Redemption Reserve for the purpose of redemption of debentures, in accordance with the conditions given below-

(a) the Debenture Redemption Reserve shall be created out of the profits of the company available for payment of dividend;

(b) the company shall create Debenture Redemption Reserve (DRR) in accordance with following conditions:-

(i) No DRR is required for debentures issued by All India Financial Institutions (AIFIs) regulated by Reserve Bank of India and Banking Companies for both public as well as privately placed debentures. For other Financial Institutions (FIs) within the meaning of clause (72) of section 2 of the Companies Act, 2013, DRR will be as applicable to NBFCs registered with RBI.

(ii) For NBFCs registered with the RBI under Section 45-IA of the RBI (Amendment) Act, 1997, *and for Housing Finance Companies registered with the National Housing Bank*[*The Companies (Share Capital and Debentures) Amendment Rules, 2014*]'the adequacy' of DRR will be 25% of the value of debentures issued through public issue as per present SEBI (Issue and Listing of Debt Securities)

Regulations, 2008, and no DRR is required in the case of privately placed debentures.

- (iii) For other companies including manufacturing and infrastructure companies, the adequacy of DRR will be 25% of the value of debentures issued through public issue as per present SEBI (Issue and Listing of Debt Securities), Regulations 2008 and also 25% DRR is required in the case of privately placed debentures by listed companies. For unlisted companies issuing debentures on private placement basis, the DRR will be 25% of the value of debentures.

The Companies (Share Capital and Debentures) Rules, 2014 issued by the Ministry of Corporate Affairs (MCA) on 27 March 2014, required companies to create debenture redemption reserve (DRR) equivalent to at least fifty per cent of the amount raised through the debenture issue. Subsequently, the Rules published in the Official Gazette on 3 April 2014 (effective from 1 April 2014), changed the above requirement for creation of DRR.

The Gazetted Rules exempt certain companies from creation of the DRR and in case of other companies, reduce the percentage of DRR from 50 per cent to 25 per cent of the value of debentures.

(c) every company required to create Debenture Redemption Reserve shall on or before the 30th day of April in each year, invest or deposit, as the case may be, a sum which shall not be less than fifteen percent, of the amount of its debentures maturing during the year ending on the 31st day of March of the next year, in any one or more of the following methods, namely:-

- (i) in deposits with any scheduled bank, free from any charge or lien;
- (ii) in unencumbered securities of the Central Government or of any State Government;
- (iii) in unencumbered securities mentioned in sub-clauses (a) to (d) and (ee) of section 20 of the Indian Trusts Act, 1882;
- (iv) in unencumbered bonds issued by any other company which is notified under sub-clause (f) of section 20 of the Indian Trusts Act, 1882;
- (v) the amount invested or deposited as above shall not be used for any purpose other than for redemption of debentures maturing during the year referred above: Provided that the amount remaining invested or deposited, as the case may be, shall not at any time fall below fifteen percent of the amount of the debentures maturing during the year ending on the 31st day of March of that year;

(d) in case of partly convertible debentures, Debenture Redemption Reserve shall be created in respect of non-convertible portion of debenture issue in accordance with this sub-rule.

(e) the amount credited to the Debenture Redemption Reserve shall not be utilised by the company except for the purpose of redemption of debentures.

(5) **Limitation on the issue of prospectus/ offer / invitation to the public:** No company

shall issue a prospectus or make an offer or invitation to the public or to its members **exceeding five hundred** for the subscription of its debentures, unless the company has, before such issue or offer, appointed one or more debenture trustees and the conditions governing the appointment of such trustees shall be such as may be prescribed.

(6) **Debenture trustee to protect the interest of debenture holders:** A debenture trustee shall take steps to protect the interests of the debenture- holders and redress their grievances in accordance with such rules as may be prescribed.

(7) **Liability of debenture trustee:** Any provision contained in a trust deed for securing the issue of debentures, or in any contract with the debenture-holders secured by a trust deed, shall be void in so far as it would have the effect of exempting a trustee thereof from, or indemnifying him against, any liability for breach of trust, where he fails to show the degree of care and due diligence required of him as a trustee, having regard to the provisions of the trust deed conferring on him any power, authority or discretion.

Exemption from the liability: Provided that the liability of the debenture trustee shall be subject to such exemptions as may be agreed upon by a majority of debenture-holders holding not less than three fourths in value of the total debentures at a meeting held for the purpose.

(8) **To pay interest and redeem the debentures:** A company shall pay interest and redeem the debentures in accordance with the terms and conditions of their issue.

(9) **Filing of petition before the Tribunal by the debenture trustee:** Where at any time the debenture trustee comes to a conclusion that the assets of the company are insufficient or are likely to become insufficient to discharge the principal amount as and when it becomes due, the debenture trustee may file a petition before the Tribunal and the Tribunal may, after hearing the company and any other person interested in the matter, by order, impose such restrictions on the incurring of any further liabilities by the company as the Tribunal may consider necessary in the interests of the debenture-holders.

(10) **On failure to redeem the debentures/ to pay interest on the debentures:** Where a company fails to redeem the debentures on the date of their maturity or fails to pay interest on the debentures when it is due, the Tribunal may, on the application of any or all of the debenture-holders, or debenture trustee and, after hearing the parties concerned, direct, by order, the company to redeem the debentures forthwith on payment of principal and interest due thereon.

(11) **Default in compliance of order of the Tribunal:** If any default is made in complying with the order of the Tribunal under this section, every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than two lakh rupees but which may extend to five lakh rupees, or with both.

(12) **Specific performance of the contract:** A contract with the company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

(13) **Procedure to be prescribed by the Central Government:** The Central Government

may prescribe the procedure, for securing the issue of debentures, the form of debenture trust deed, the procedure for the debenture-holders to inspect the trust deed and to obtain copies thereof, quantum of debenture redemption reserve required to be created and such other matters.

Fixed and floating charges: Debentures may be secured by a fixed charge or by a floating charge or by a combination of both. A floating charge is an equitable charge which is not a specific charge on any property of the company. Thus, the company may, despite the charge deal with any of the assets in the ordinary course of business. "It is of the essence of a floating charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created, intervenes. His right to intervene may, of course, be suspended by agreement. But if there is no agreement of suspension, he may exercise his right whenever he pleases after default."

On the other hand, a specific (fixed) charge is a charge which is expressed to cover specific property like land, building, etc. Although the company usually remains in possession of the property, it can only deal with it subject to the prior rights created by the charge.

It is thus evident that a floating charge is characteristically ambulatory and shifting; it flows "with the property which is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp." But specific charge is a charge which fastens on to the property which is ascertained and definite or capable of being ascertained and made definite.

The main characteristics of a floating charge [as described in *Re. Yorkshire Woolcombers's Association* (1903) 2. Ch. 284 and 285] are as follows:

- (a) It is a charge on a class of the company's assets, present and future, that class being one which, in the ordinary course of the business is changing from time to time.
- (b) Generally, it is contemplated that the company carry on its business in an ordinary way with such a class of assets till some event occurs on which the charge is to settle down on the property as then existing and the charge becomes fixed. The moment the charge crystallises, it becomes a fixed charge. It takes place when some event contemplated in the agreement creating the charge occurs, *e.g.* debenture holders enforcing their securities on a default being made by company either in payment of interest or capital on the company being wound up.

There are two major statutory limitations to the rights arising out of floating charge.

Firstly, a floating charge created within 12 months preceding the commencement of the winding up (whether compulsory or voluntary or subject to supervision), shall unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except up to the amount of any cash paid to the company at the time of, or subsequent to the creation of and in consideration for the charge together with the interest on that amount @ of 5 per cent per annum or at any other rate as may be notified by the Central Government (Section 332 of the Companies Act, 2013).

[Note: You should note that although these provisions of Section 332 of the Companies Act, 2013 are excluded from your syllabus nonetheless you should read them by way of passing reference].

Secondly, floating charge crystallises, *i.e.* becomes fixed and consequently the security ceases to be a floating security (i) in the charge, *i.e.* failure of the company to pay interest or to redeem the debentures as agreed; cessation of businesses by the company, (ii) if a receiver is appointed for the debenture holders either by the Court or by the debenture holders or their trustees under power given by terms of issue of debentures and (iii) if the company is wound up even if it is a voluntary winding up for the purpose of reconstruction [*Re Crompton & Co.* (1914) 1. Ch. 954.]

Debentures with voting rights not permissible

No company can issue any debentures carrying voting rights at any meeting of the company, whether generally or in respect of any particular classes of business [Section 71(2) of 2013 Act]. The idea behind prohibition of issue of debentures with voting rights is to ensure that debenture holders are not placed in a much more advantageous position than the holders of equity shares and are not in a position to influence the policy of the company in a manner detrimental to the interest of the general body of shareholders.

Distinction between debenture and share

- (i) Shares are a part of the capital of a company whereas debentures constitute a loan.
- (ii) The shareholders are the owners of the company whereas debenture holders are creditors.
- (iii) Shareholders generally enjoy voting right whereas debenture holders do not have any voting right.
- (iv) Interest on debenture is payable even if there are no profits. But dividends can be paid to shareholders only out of the profits of the company.
- (v) Debentures generally have a charge on the assets of the company but shares do not carry any such charge.
- (vi) The rate of interest is fixed in the case of debentures whereas on equity shares the dividend may vary from year to year.
- (vii) Fixed amount of interest on debentures gets priority over dividend on shares.

3.25 Registration of a Charge

According to section 2(16) of the Companies Act, 2013 "charge" has been defined as an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.

The law with respect to the registration of charges are dealt in sections 77 to 87 of the Companies Act, 2013. The sections provides the law with respect to the registering of the charges.

1. Duty of the company to register charges: According to section 77 of the Companies Act, 2013, it shall be duty of the company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise and situated in or outside India, to register the particulars of the charge signed by the company and the charge holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the registrar within 30 days of creation.

Registration by the registrar: The Registrar may, on an application by the company, allow such registration to be made within a period of three hundred days of such creation on payment of such additional fees as may be prescribed.

Provided further that if registration is not made within a period of three hundred days of such creation, the company shall seek extension of time in accordance with section 87.

Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

Condonation of delay by Registrar.-(1) The Registrar may, on being satisfied that the company had sufficient cause for not filing the particulars and instrument of charge, if any, within a period of thirty days of the date of creation of the charge, allow the registration of the same after thirty days but within a period of three hundred days of the date of such creation of charge or modification of charge on payment of additional fee.

(2) The application for delay shall be made and supported by a declaration from the company signed by its secretary or director that such belated filing shall not adversely affect rights of any other intervening creditors of the company. (The Companies (Registration of Charges) Rules, 2014)

Issue of certificate of registration by registrar: Where a charge is registered with the Registrar, a certificate of registration of such charge shall be issued in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favour the charge is created.

No charge to be taken into account by the liquidator/creditor: Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator or any other creditor, unless –

- (i) it is duly registered under sub-section (1), and
- (ii) a certificate of registration of such charge is given by the Registrar under sub-section (2).

Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by a charge.

2. Application for registration of charge: As per section 78 of the Companies Act, 2013, where a company fails to register the charge within the period 30 days, without prejudice to its liability in respect of any offence under this Chapter, the person in whose favour the charge is created may apply to the Registrar for registration of the charge along with the instrument

created for the charge, within such time and in such form and manner as may be prescribed and the Registrar may, on such application, within a period of fourteen days after giving notice to the company, unless the company itself registers the charge or shows sufficient cause why such charge should not be registered, allow such registration on payment of such fees, as may be prescribed.

Provided that where registration is effected on application of the person in whose favour the charge is created, that person shall be entitled to recover from the company the amount of any fees or additional fees paid by him to the Registrar for the purpose of registration of charge.

3. Section 77 to apply in certain matters: Section 79 of the Companies Act, 2013, says that section 77 relating to registration of charges shall, so far as may be, apply to—

- (a) a company acquiring any property subject to a charge within the meaning of that section; or
- (b) any modification in the terms or conditions or the extent or operation of any charge registered under that section.

As per the (The Companies (Registration of Charges) Rules, 2014), where the particulars of modification of charge is registered under section 79, the Registrar shall issue a certificate of modification of charge. The certificate issued by the Registrar shall be conclusive evidence that the requirements of Chapter VI of the Act and the rules made thereunder as to registration of creation or modification of charge, as the case may be, have been complied with.

4. Date of notice of charge: According to section 80 of the Companies Act, 2013, where any charge on any property or assets of a company or any of its undertakings is registered under section 77, any person acquiring such property, assets, undertakings or part thereof or any share or interest therein shall be deemed to have notice of the charge from the date of such registration.

5. Register of charges to be kept by Registrar: Section 81 of the Companies Act, 2013 deals with maintenance of the register of charges by the registrar. According to it, the Registrar shall, in respect of every company, keep a register containing particulars of the charges registered under this Chapter in such form and in such manner as may be prescribed.

Such a register, shall be open to inspection by any person on payment of such fees as may be prescribed for each inspection.

The particulars of charges maintained on the Ministry of Corporate Affairs portal (www.mca.gov.in/MCA21) shall be deemed to be the register of charges for the purposes of section 81 of the Act.

6. Company to report satisfaction of charge: (i) Company to intimate the registrar on the satisfaction of charge: According to section 82 of the Companies Act, 2013, a company shall give intimation to the Registrar in the prescribed form, of the payment or satisfaction in full of any charge registered under this Chapter within a period of thirty days from the date of such payment or satisfaction and the provisions of section 77(1) shall, as far as may be, apply to an intimation given under this section.

(ii) **Notice to the holder of charge by the registrar:** The Registrar shall, on receipt of intimation, cause a notice to be sent to the holder of the charge calling upon him to show cause within such time not exceeding fourteen days, as may be specified in such notice, as to why payment or satisfaction in full should not be recorded as intimated to the Registrar, and if no cause is shown, by such holder of the charge, the Registrar shall order that a memorandum of satisfaction shall be entered in the register of charges kept by him under section 81 and shall inform the company that he has done so.

However, no notice shall be required to be sent, in case the intimation to the Registrar in this regard is in the specified form and signed by the holder of charge.

(iii) **If any cause is shown,** the Registrar shall record a note to that effect in the register of charges and shall inform the company.

(iv) **No effect of this section on the powers of the Registrar:** Nothing in this section shall be deemed to affect the powers of the Registrar to make an entry in the register of charges under section 83 or otherwise than on receipt of an intimation from the company.

7. Power of Registrar to make entries of satisfaction and release in absence of intimation from company: Section 83 of the Companies Act, 2013 provides powers to the registrar to make entries with respect to the satisfaction and release of charges where no intimation has been received by him from the company.

(i) The Registrar may, on evidence being given to his satisfaction with respect to any registered charge,—

- (a) that the debt for which the charge was given has been paid or satisfied in whole or in part; or
- (b) that part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking,

- enter in the register of charges a memorandum of satisfaction in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be, despite the fact that no intimation has been received by him from the company.

(ii) The Registrar shall inform the affected parties within thirty days of making the entry in the register of charges kept under section 81(1).

According to the Companies (Registration of Charges) Rules, 2014 with respect to the satisfaction of charge- (1) A company shall within a period of thirty days from the date of the payment or satisfaction in full of any charge registered, give intimation of the same to the Registrar along with the fee.

(2) Where the Registrar enters a memorandum of satisfaction of charge in full in pursuance of section 82 or 83, he shall issue a certificate of registration of satisfaction of charge.

8. Intimation of appointment of receiver or manager to the company and the registrar: Section 84 of the Companies Act, 2013 provides that if any person obtains an order for the appointment of a receiver of, or of a person to manage, the property, subject to a charge, of a company or if any person appoints such receiver or person under any power contained in any

instrument, he shall, within a period of thirty days from the date of the passing of the order or of the making of the appointment, give notice of such appointment to the company and the Registrar along with a copy of the order or instrument and the Registrar shall, on payment of the prescribed fees, register particulars of the receiver, person or instrument in the register of charges.

Any person appointed above shall, on ceasing to hold such appointment, give to the company and the Registrar a notice to that effect and the Registrar shall register such notice.

9. Company's register of charges: According to section 85 of the Companies Act, 2013, every company shall keep at its registered office a register of charges in such form and in such manner as may be prescribed, which shall include therein all charges and floating charges affecting any property or assets of the company or any of its undertakings, indicating in each case such particulars as may be prescribed.

Section provides that a copy of the instrument creating the charge shall also be kept at the registered office of the company along with the register of charges.

According to the rules related to the Company's register of charges-

- (1) every company shall keep at its registered office a register of charges and enter therein particulars of all the charges registered with the Registrar on any of the property, assets or undertaking of the company and the particulars of any property acquired subject to a charge as well as particulars of any modification of a charge and satisfaction of charge.
- (2) The entries in the register of charges maintained by the company shall be made forthwith after the creation, modification or satisfaction of charge, as the case may be.
- (3) Entries in the register shall be authenticated by a director or the secretary of the company or any other person authorised by the Board for the purpose.
- (4) The register of charges shall be preserved permanently and the instrument creating a charge or modification thereon shall be preserved for a period of eight years from the date of satisfaction of charge by the company.

10. Inspection of the register of charges and instrument of charges: The register of charges and instrument of charges, shall be open for inspection during business hours—

- (a) by any member or creditor without any payment of fees; or
- (b) by any other person on payment of such fees as may be prescribed,

-subject to such reasonable restrictions as the company may, by its articles, impose.

11. Punishment for contravention: According to section 86 of the Companies Act, 2013, if any company contravenes any provision relating to the registration of charges contained under chapter VI of the Act, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to ten lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

12. Rectification by Central Government in register of charges: Section 87 of the Companies Act, 2013 empowers the Central Government to make rectification in register of charges. According to the provision- (1) The Central Government on being satisfied that—

(i) (a) the **omission to file with the Registrar the particulars of any charge** created by a company or any charge subject to which any property has been acquired by a company or any modification of such charge; or

(b) the omission to register any charge within the time required under this Chapter or the omission to give intimation to the Registrar of the payment or the satisfaction of a charge, within the time required under this Chapter; or

(c) the **omission or mis-statement of any particular** with respect to any such charge or modification or with respect to any memorandum of satisfaction or other entry made in pursuance of section 82 or section 83,

- was accidental or due to inadvertence or some other sufficient cause or it is not of a nature to prejudice the position of creditors or shareholders of the company; or

(ii) **on any other grounds**, it is just and equitable to grant relief,

-it may on the application of the company or any person interested and on such terms and conditions as it may seem to the Central Government just and expedient, direct that the time for the filing of the particulars or for the registration of the charge or for the giving of intimation of payment or satisfaction shall be extended or, as the case may require, that the omission or mis-statement shall be rectified.

(2) Where the Central Government extends the time for the registration of a charge, the order shall not prejudice any rights acquired in respect of the property concerned before the charge is actually registered.

Condonation of delay and rectification of register of charges.- (1) Where the instrument creating or modifying a charge is not filed within a period of three hundred days from the date of its creation (including acquisition of a property subject to a charge) or modification and where the satisfaction of the charge is not filed within thirty days from the date on which such payment of satisfaction, the Registrar shall not register the same unless the delay is condoned by the Central Government.

(2) The application for condonation of delay and for such other matters covered in sub-clause (a),(b) and (c) of clause (i) of sub-section (1) of section 87 of the Act shall be filed with the Central Government along with the fee.

(3) The order passed by the Central Government under sub-section (1) of section 87 of the Act shall be required to be filed with the Registrar along with the fee as per the conditions stipulated in the said order.

Annexure

Sections which are not yet notified

1. Section 48: Variation of shareholders' right

Section 48 of the Companies Act, 2013 provides the laws with respect to the variation of rights attached to the shares. The provision states that-

(1) **Variation in shareholders rights with consent:** Where a share capital of the company is divided into different classes of shares, the rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or by means of a special resolution passed at a separate meeting of the holders of the issued shares of that class,—

- (a) if provision with respect to such variation is contained in the memorandum or articles of the company; or
- (b) in the absence of any such provision in the memorandum or articles, if such variation is not prohibited by the terms of issue of the shares of that class:

Provided that if variation by one class of shareholders affects the rights of any other class of shareholders, the consent of three-fourths of such other class of shareholders shall also be obtained and the provisions of this section shall apply to such variation.

(2) **No consent to such variation:** Where the holders of not less than ten per cent. of the issued shares of a class did not consent to such variation or vote in favour of the special resolution for the variation, they may apply to the Tribunal to have the variation cancelled, and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Tribunal.

Filing of application: An application shall be made within twenty-one days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(3) **Decision shall be binding on shareholders:** The decision of the Tribunal on any application shall be binding on the shareholders.

(4) **Filing of order copy with the registrar:** The company shall, within thirty days of the date of the order of the Tribunal, file a copy thereof with the Registrar.

(5) **Punishment in case of default:** Where any default is made in complying with the provisions, the company shall be punishable with minimum fine of twenty-five thousand rupees extending to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term extending to six months or with fine varying from twenty-five thousand rupees to five lakh rupees, or with both.

2. Section 66: Reduction of share capital

(1) **Reduction of share capital by special resolution:** Subject to confirmation by the Tribunal on an

application by the company, a company limited by shares or limited by guarantee and having a share capital may, by a special resolution, reduce the share capital in any manner and in particular, may—

- (a) extinguish or reduce the liability on any of its shares in respect of the share capital not paid-up; or
- (b) either with or without extinguishing or reducing liability on any of its shares,—
 - (i) cancel any paid-up share capital which is lost or is unrepresented by available assets; or
 - (ii) pay off any paid-up share capital which is in excess of the wants of the company, alter its memorandum by reducing the amount of its share capital and of its shares accordingly:

No reduction shall be made: Section further Provides that no such reduction shall be made if the company is in arrears in the repayment of any deposits accepted by it, either before or after the commencement of this Act, or the interest payable thereon.

- (2) **Issue of Notice from the Tribunal:** The Tribunal shall give notice of every application made to it under sub-section (7) to the Central Government, Registrar and to the Securities and Exchange Board, in the case of listed companies, and the creditors of the company and shall take into consideration the representations, if any, made to it by that Government, Registrar, the Securities and Exchange Board and the creditors within a period of three months from the date of receipt of the notice:

Provided that where no representation has been received from the Central Government, Registrar, the Securities and Exchange Board or the creditors within the said period, it shall be presumed that they have no objection to the reduction.

- (3) **Order of tribunal:** The Tribunal may, if it is satisfied that the debt or claim of every creditor of the company has been discharged or determined or has been secured or his consent is obtained, make an order confirming the reduction of share capital on such terms and conditions as it deems fit:

Provided that no application for reduction of share capital shall be sanctioned by the Tribunal unless the accounting treatment, proposed by the company for such reduction is in conformity with the accounting standards specified in section 133 or any other provision of this Act and a certificate to that effect by the company's auditor has been filed with the Tribunal.

- (4) **Publishing of order of confirmation of tribunal:** The order of confirmation of the reduction of share capital by the Tribunal under sub-section (3) shall be published by the company in such manner as the Tribunal may direct.
- (5) **Delivery of certified copy of order to the registrar:** The company shall deliver a certified copy of the order of the Tribunal under subsection (3) and of a minute approved by the Tribunal showing—
 - (a) the amount of share capital;
 - (b) the number of shares into which it is to be divided;
 - (c) the amount of each share; and

- (d) the amount, if any, at the date of registration deemed to be paid-up on each share, to the Registrar within thirty days of the receipt of the copy of the order, who shall register the same and issue a certificate to that effect.
- (6) Nothing in this section shall apply to buy-back of its own securities by a company under section 68.
- (7) **No liability of member:** A member of the company, past or present, shall not be liable to any call or contribution in respect of any share held by him exceeding the amount of difference, if any, between the amount paid on the share, or reduced amount, if any, which is to be deemed to have been paid thereon, as the case may be, and the amount of the share as fixed by the order of reduction.
- (8) **In case where creditor is entitled to object:** Where the name of any creditor entitled to object to the reduction of share capital under this section is, by reason of his ignorance of the proceedings for reduction or of their nature and effect with respect to his debt or claim, not entered on the list of creditors, and after such reduction, the company is unable, within the meaning of sub-section (2) of section 271, to pay the amount of his debt or claim,—
 - (a) every person, who was a member of the company on the date of the registration of the order for reduction by the Registrar, shall be liable to contribute to the payment of that debt or claim, an amount not exceeding the amount which he would have been liable to contribute if the company had commenced winding up on the day immediately before the said date; and
 - (b) if the company is wound up, the Tribunal may, on the application of any such creditor and proof of his ignorance as aforesaid, if it thinks fit, settle a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list, as if they were ordinary contributories in a winding up.
- (9) Nothing in sub-section (8) shall affect the rights of the contributories among themselves.
- (10) **Liability of officer:** If any officer of the company—
 - (a) knowingly conceals the name of any creditor entitled to object to the reduction;
 - (b) knowingly misrepresents the nature or amount of the debt or claim of any creditor; or
 - (c) abets or is privy to any such concealment or misrepresentation as aforesaid, he shall be liable under section 447.
- (11) **In case of failure to publish the order of confirmation of the reduction of shares:** If a company fails to comply with the provisions of sub-section (4), it shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees.

UNIT- 4 : MEETINGS & PROCEEDINGS

Learning objectives

The management and administration of a company constitutes an integral and important portion in the Companies Act, 2013. It gives an opportunity to the shareholders to know about the state of affairs of the company and also deliberate on various issues. This part of chapter deals with the maintenance of the Registers and preparation of the annual returns. There are different kinds of meetings that have to be convened upon by the company and statutory requirements have to be complied while calling, convening and conducting of the meetings. In this unit the students are exposed to the working knowledge on the following aspects:

- ◆ Procedure for conduct of annual general and extraordinary general meeting.
- ◆ General requirements to be complied with for convening and conduct of general meetings
- ◆ Meetings of debentures holders
- ◆ Minutes

4.0 Introduction

A company is an artificial legal entity distinct from its members, thus, the affairs of the company are practically done by the Board of Directors. The Board of Directors in carrying out the day-to-day affairs of the company has to perform the role within their limited powers and the powers, which are granted to them. Certain powers can be exercised by the board of their own and some with the consent of the company at the general meeting. The shareholders as owners of the company ratify the actions of the board at the meetings of the company. The meetings of the shareholders serve as the focal point for the shareholders to converge and give their decisions on the actions taken by the directors.

4.1 Maintenance of registers and returns

The Companies Act, 2013 requires that a company shall keep certain books known as statutory books and copies of certain documents and deeds at its registered office. The Act places an obligation on the company to file certain returns and documents with the registrar of companies. The various statutory books maintained by the company may include Register of charges, register of members and index, of debenture holders and other security holders, foreign register of members, books of accounts etc. Besides these statutory books, company may also maintain certain other books which are necessary for effective and efficient working of the company. This may include holding and transfer of shares and debentures, share warrant issued and surrendered, register of proxies etc.

Sections 88 to 91 and 94 to 95 of the Companies Act, 2013 deal with the provisions related to maintenance of registers, place for keeping the registers, its inspection and its use as an

evidence. Whereas sections 92 and 93 deal with the provision related to annual return and its filing with registrar.

4.1.1 Register of members: Section 88 of the Companies Act, 2013 provides that register for holder of all types of securities issued by the Company has to be maintained.

1. Duty of company to maintain registers: Every company shall keep and maintain the following registers in such form and in such manner as may be prescribed, namely:—

- (a) register of members indicating separately for each class of equity and preference shares held by each member residing in or outside India;
- (b) register of debenture-holders; and
- (c) register of any other security holders.

Thus, the Register of members shall separately indicate the equity shareholders and preference shareholders residing in India and outside India.

2. Index of names: Every such register maintained shall include an index of the names included therein.

3. The register and index of beneficial owners maintained by a depository under the Depositories Act, 1996, shall be deemed to be the corresponding register and index for the purposes of this Act.

4. Foreign register: A company may, if so authorised by its articles, keep in any country outside India, a part of the register referred to in section 88(1). Such a part of register called “foreign register” containing the names and particulars of the members, debenture-holders, other security holders or beneficial owners residing outside India.

5. Failure to maintain the registers: If a company does not maintain a register of members or debenture-holders or other security holders or fails to maintain them in accordance with the provisions of sub-section (1) or sub-section (2) of section 88, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees and where the failure is a continuing one, with a further fine which may extend to one thousand rupees for every day, after the first during which the failure continues.

According to the Companies (Management and Administration) Rules, 2014, every company limited by shares shall, from the date of its registration, maintain a register of its members. The rules further provides that in the case of existing companies, registered under the Companies Act, 1956, particulars shall be compiled within six months from the date of commencement of these rules.

Whereas with respect to the maintenance of register of debenture holders or any other security holders.- every company which issues or allots debentures or any other security shall maintain a separate register of debenture holders or security holders, as the case may be, for each type of debentures or other securities.

Maintenance of the Register of members etc. under section 88-

Every company shall maintain the registers of members, debenture holders and of any other security holders in the following manner namely:-

- (1) **Entries in the register:** The entries in the registers maintained under section 88 shall be made within seven days after the Board of Directors or its duly constituted committee approves the allotment or transfer of shares, debentures or any other securities, as the case may be.
- (2) **Place for keeping the register:** The registers shall be maintained at the registered office of the company unless a special resolution is passed in a general meeting authorising the keeping of the register at any other place within the city, town or village in which the registered office is situated or any other place in India in which more than one-tenth of the total members entered in the register of members reside.
- (3) **Entries of any changes in the register:** Consequent upon any forfeiture, buy-back, reduction, sub-division, consolidation or cancellation of shares, issue of sweat equity shares, transmission of shares, shares issued under any scheme of arrangements, mergers, reconstitution or employees stock option scheme or any of such scheme provided under this Act or by issue of duplicate or new share certificates or new debenture or other security certificates, entry shall be made within seven days after approval by the Board or committee, in the register of members or in the respective registers, as the case may be.
- (4) **Entries with respect to the change in the status of the members, etc.:** If any change occurs in the status of a member or debenture holder or any other security holder whether due to death or insolvency or change of name or due to transfer to Investor Education Protection Fund or due to any other reason, entries thereof explaining the change shall be made in the respective register.
- (5) **Rectification in the register:** If any rectification is made in the register maintained under section 88 by the company pursuant to any order passed by the competent authority under the Act, the necessary reference of such order shall be indicated in the respective register.
- (6) **Reference of order in the respective register:** If any order is passed by any judicial or revenue authority or by Security and Exchange Board of India (SEBI) or Tribunal attaching the shares, debentures or other securities and giving directions for remittance of dividend or interest, the necessary reference of such order shall be indicated in the respective register.
- (7) **Entries of the companies whose securities are listed on a stock exchange:** In case of companies whose securities are listed on a stock exchange in or outside India, the particulars of any pledge, charge, lien or hypothecation created by the promoters in respect of any securities of the company held by the promoter including the names of

pledgee/pawnee and any revocation therein shall be entered in the register within fifteen days from such an event.

- (8) **In respect of Joint Venture Company:** If promoters of any listed company, which have formed a joint venture company with another company have pledged or hypothecated or created charge or lien in respect of any security of the listed company in connection with such joint venture company, the particulars of such pledge, hypothecation, charge and lien shall be entered in the register of members of the listed company within fifteen days from such an event.

Rules related to index of names to be included in Register.-

- (1) Every register maintained under sub-section (1) of section 88 shall include an index of the names entered in the respective registers and the index shall, in respect of each folio, contain sufficient indication to enable the entries relating to that folio in the register to be readily found.
- (2) The maintenance of index is not necessary in case the number of members is less than fifty.
- (3) The company shall make the necessary entries in the index simultaneously with the entry for allotment or transfer of any security in such Register.

Foreign register of members, debenture holders, other security holders or beneficial owners residing outside India - The rule prescribes the manner in which the foreign register may be maintained outside India.

- (1) A company which has share capital or which has issued debentures or any other security may, if so authorised by its articles, keep in any country outside India, a part of the register of members or as the case may be, of debenture holders or of any other security holders or of beneficial owners, resident in that country (hereafter in this rule referred to as the "foreign register").
- (2) The company shall, within thirty days from the date of the opening of any foreign register, file with the Registrar notice of the situation of the office along with the fee where such register is kept; and in the event of any change in the situation of such office or of its discontinuance, shall, within thirty days from the date of such change or discontinuance, as the case may be, file notice with the Registrar of such change or discontinuance.
- (3) A foreign register shall be deemed to be part of the company's register known as "principal register" of members or of debenture holders or of any other security holders or beneficial owners, as the case may be.
- (4) The foreign register shall be maintained in the same format as the principal register.
- (5) A foreign register shall be open to inspection and may be closed, and extracts may be taken there from and copies thereof may be required, in the same manner, as is applicable to the principal register, except that the advertisement before closing the

register shall be inserted in at least two newspapers circulating in the place wherein the foreign register is kept.

- (6) If a foreign register is kept by a company in any country outside India, the decision of the appropriate competent authority in regard to the rectification of the register shall be binding.
- (7) Entries in the foreign register maintained under sub-section (4) of section 88 shall be made simultaneously after the Board of Directors or its duly constituted committee approves the allotment or transfer of shares, debentures or any other securities, as the case may be.
- (8) The company shall—
 - (a) transmit to its registered office in India a copy of every entry in any foreign register within fifteen days after the entry is made; and
 - (b) keep at such office a duplicate register of every foreign register duly entered up from time to time.
- (9) Every such duplicate register shall, for all the purposes of this Act, be deemed to be part of the principal register.
- (10) Subject to the provisions of section 88 and the rules made thereunder, with respect to duplicate registers, the shares or as the case may be, debentures or any other security, registered in any foreign register shall be distinguished from the shares or as the case may be, debentures or any other security, registered in the principal register and in every other foreign register; and no transaction with respect to any shares or as the case may be, debentures or any other security, registered in a foreign register shall, during the continuance of that registration, be registered in any other register.
- (11) The company may discontinue the keeping of any foreign register; and thereupon all entries in that register shall be transferred to some other foreign register kept by the company outside India or to the principal register.

Authentication – The rules prescribe that the entries in the registers and index included therein shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose, and the date of the board resolution authorising the same shall be mentioned. The entries in the foreign register shall be authenticated by the company secretary of the company or person authorised by the Board by appending his signature to each entry.

4.1.2 Declaration in respect of beneficial interest in any share: According to section 89 of the Companies Act, 2013, a declaration is to be given to the company by any person who is a member but not holding the beneficial interest in such shares. The provisions say that-

1. **Person who does not hold the beneficial interest in share:** Where the name of a person is entered in the register of members of a company as the holder of shares in that

company but who does not hold the beneficial interest in such shares, such person shall make a declaration within such time and in such form as may be prescribed to the company specifying the name and other particulars of the person who holds the beneficial interest in such shares. [Section 89(1)]

2. Person who holds or acquires a beneficial interest in share: Every person who holds or acquires a beneficial interest in share of a company shall make a declaration to the company specifying the nature of his interest, particulars of the person in whose name the shares stand registered in the books of the company and such other particulars as may be prescribed. [Section 89(2)]

3. Change in the beneficial interest: Where any change occurs in the beneficial interest in such shares, the person who does not hold the beneficial interest in such shares (referred to in pt 1.) and the beneficial owner (specified in pt 2.) shall, within a period of 30 days from the date of such change, make a declaration to the company in such form and containing such particulars as may be prescribed. [Section 89(3)]

4. Power of Central Government to make rules: The Central Government may make rules to provide for the manner of holding and disclosing beneficial interest and beneficial ownership under this section.

5. Penalty: If any person fails, to make a declaration as required under section 89(1) or section 89(2) or section 89(3), without any reasonable cause, he shall be punishable with fine which may extend to fifty thousand rupees and where the failure is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the failure continues.

6. Filing of return: Where any declaration under this section is made to a company, the company shall make a note of such declaration in the register concerned and shall file, within thirty days from the date of receipt of declaration by it, a return in the prescribed form with the Registrar in respect of such declaration with such fees or additional fees as may be prescribed, within the time specified under section 403.

7. Penalty in case of non filing of return: If a company, required to file a return, fails to do so before the expiry of the time specified under the first proviso to sub-section (1) of section 403, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than five hundred rupees but which may extend to one thousand rupees and where the failure is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the failure continues.

8. No claim of right related to any share: No right in relation to any share in respect of which a declaration is required to be made under this section but not made by the beneficial owner, shall be enforceable by him or by any person claiming through him.

9. No effect on the obligation of a company to pay dividend: Nothing in this section shall be deemed to prejudice the obligation of a company to pay dividend to its members under this Act and the said obligation shall, on such payment, stand discharged.

As per the Companies (Management & Administration) Rules, 2014, where any declaration under section 89 is received by the company, the company shall make a note of such declaration in the register of members and shall file, within a period of 30 days from the date of receipt of declaration by it, a return with the registrar in respect of such declaration with fee.

According to the Companies (Management and Administration) Second Amendment Rules, 2014 through Notification dated 24th of July, 2014, a proviso is inserted below the above para [i.e. under Rule 9(3)] stating:—

"Provided that nothing contained in this rule with respect to section 89 of the Companies Act, 2013 shall apply in relation to a trust which is created, to set up a Mutual Fund or Venture Capital Fund or such other fund as may be approved by the Securities and Exchange Board of India".

4.1.3 Investigation of beneficial ownership of shares in certain cases: According to section 90 of the Companies Act, 2013, where it appears to the Central Government that there are reasons so to do, it may appoint one or more competent persons to investigate and report as to beneficial ownership with regard to any share or class of shares and the provisions of section 216 of the Companies Act, 2013, related to 'Investigation of ownership of company' shall, as far as may be, apply to such investigation as if it were an investigation ordered under that section.

4.1.4 Power to close register of members or debenture holders or other security holders: According to section 91 of the Companies Act, 2013, a company may close the registers of holders by complying with the following requirements-

- (1) A company may close the register of members or the register of debenture holders or the register of other security holders for any period or periods not exceeding in the aggregate forty-five days in each year, but not exceeding thirty days at any one time, subject to giving of previous notice of at least seven days or such lesser period as may be specified by Securities and Exchange Board for listed companies or the companies which intend to get their securities listed, in such manner as may be prescribed.
- (2) If the register of members or of debenture-holders or of other security holders is closed without giving the notice as provided in sub-section (1), or after giving shorter notice than that so provided, or for a continuous or an aggregate period in excess of the limits specified in that sub-section, the company and every officer of the company who is in default shall be liable to a penalty of five thousand rupees for every day subject to a maximum of one lakh rupees during which the register is kept closed.

Closure of register of members or debenture holders or other security holders.-

The Companies (Management and Administration) Rules, 2014, lay down the manner in which register of members etc. may be closed-

- (1) **Prior notice for the closing of register:** A company closing the register of members or the register of debenture holders or the register of other security holders shall give at least

seven days previous notice and in such manner, as may be specified by Securities and Exchange Board of India, if such company is a listed company or intends to get its securities listed, by advertisement at least once in a vernacular newspaper in the principal vernacular language of the district and having a wide circulation in the place where the registered office of the company is situated, and at least once in English language in an English newspaper circulating in that district and having wide circulation in the place where the registered office of the company is situated and publish the notice on the website as may be notified by the Central Government and on the website, if any, of the Company.

(2) **In case of private company:** The rule provides that the notice served on all members of the private company not less than seven days prior to closure of the register of members or debenture holders or other security holders is sufficient. It does not require of giving any advertisement or publishing the notice on the website as given above.

4.1.5 Annual Return- According to section 92 of the Companies Act, 2013, every company shall prepare an annual return containing the particulars as they stood on the close of the financial year. The law given is as under with respect to the preparation of the annual return-

1. Particulars stated in the annual return: Annual return prepared in the prescribed form shall contain the following particulars as on the close of the financial year—

- (a) its registered office, principal business activities, particulars of its holding, subsidiary and associate companies;
- (b) its shares, debentures and other securities and shareholding pattern;
- (c) its indebtedness;
- (d) its members and debenture-holders along with changes therein since the close of the previous financial year;
- (e) its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year;
- (f) meetings of members or a class thereof, Board and its various committees along with attendance details;
- (g) remuneration of directors and key managerial personnel;
- (h) penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment;
- (i) matters relating to certification of compliances, disclosures as may be prescribed;
- (j) details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors indicating their names, addresses, countries of incorporation, registration and percentage of shareholding held by them; and
- (k) such other matters as may be prescribed, and signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice:

Whereas with respect to One Person Company and small company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company.

2. Disclosure of facts correctly and adequately: The annual return, filed by a listed company or, by a company having such paid-up capital and turnover as may be prescribed, shall be certified by a company secretary in practice in the prescribed form, stating that the annual return discloses the facts correctly and adequately and that the company has complied with all the provisions of this Act.

3. Extract shall form part of the Board's report: An extract of the annual return in such form as may be prescribed shall form part of the Board's report.

4. Filing of copy with the registrar: Every company shall file with the Registrar a copy of the annual return, within sixty days from the date on which the annual general meeting is held or where no annual general meeting is held in any year within sixty days from the date on which the annual general meeting should have been held together with the statement specifying the reasons for not holding the annual general meeting, with such fees or additional fees as may be prescribed, within the time as specified, under section 403(Fee for filing etc.).

5. Failure to file annual return: If a company fails to file its annual return under sub-section (4), before the expiry of the period specified under section 403 with additional fee, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakhs rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

6. Certification otherwise than in conformity with the requirements of this section: If a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of this section or the rules made thereunder, he shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

As per the rules, the annual return, filed by a listed company or a company having paid-up share capital of ten crore rupees or more or turnover of fifty crore rupees or more, shall be certified by a Company Secretary in practice.

4.1.6 Return to be filed with Registrar in case promoters' stake changes- Section 93 of the Companies Act, 2013 provides that every listed company shall file a return in the prescribed form with the Registrar with respect to change in the number of shares held by promoters and top ten shareholders of such company, within fifteen days of such change.

According to the Companies (Management and Administration) rules, 2014, every listed company shall file with the Registrar, a return in prescribed form along with the fee with respect to changes relating to either increase or decrease of two percent, or more in the shareholding position of promoters and top ten shareholders of the company in each case, within fifteen days of such change.

As per the Companies (Management and Administration) Second Amendment Rules, 2014 through Notification dated 24th July 2014, changes have been carried out in the Companies (Management and Administration) Amendment Rules, 2014 in Rule 13(Stated above) whereby the words "either value or volume of the shares" is omitted along with the explanation giving meaning of 'change.'

4.1.7 Place of keeping and inspection of registers, returns, etc.: Section 94 of the Companies Act, 2013, provides the place where the registers, returns etc shall be kept and open for the inspection. According to the section, the registers required to be kept and maintained by a company under section 88 and copies of the annual return filed under section 92 shall be kept at the registered office of the company.

Provided that such registers or copies of return may also be kept at any other place in India in which more than one-tenth of the total number of members entered in the register of members reside, if approved by a special resolution passed at a general meeting of the company and the Registrar has been given a copy of the proposed special resolution in advance.

Provided further that the period for which the registers, returns and records are required to be kept shall be such as may be prescribed.

The registers and their indices, except when they are closed under the provisions of this Act, and the copies of all the returns shall be open for inspection by any member, debenture-holder, other security holder or beneficial owner, during business hours without payment of any fees and by any other person on payment of such fees as may be prescribed.

Any such member, debenture-holder, other security holder or beneficial owner or any other person may—

- (a) take extracts from any register, or index or return without payment of any fee; or
- (b) require a copy of any such register or entries therein or return on payment of such fees as may be prescribed.

If any inspection or the making of any extract or copy required under this section is refused, the company and every officer of the company who is in default shall be liable, for each such default, to a penalty of one thousand rupees for every day subject to a maximum of one lakh rupees during which the refusal or default continues.

The Central Government may also, by order, direct an immediate inspection of the document, or direct that the extract required shall forthwith be allowed to be taken by the person requiring it. (Sub-section 5)

As per the Notification dated 31st March, 2015, in the section 94(5) as given above, the power given to the Central Government with respect to inspection of the document has been delegated to the Regional Directors at Mumbai, Kolkata, Chennai, Noida, Ahmedabad, Hyderabad and Shillong, vested in it, subject to the condition that the Central Government may revoke such delegatlon of powers or may itself exercise the

powers under the said sub-section, if in its opinion such a course of action is necessary in the public interest.

According to the Companies (Management and Administration) rules, 2014,-

- (1) The registers and indices maintained according to section 88 and copies of returns prepared in accordance with section 92, shall be open for inspection during business hours, at such reasonable time on every working day as the board may decide, by any member, debenture holder, other security holder or beneficial owner without payment of fee and by any other person on payment of such fee as may be specified in the articles of association of the company but not exceeding fifty rupees for each inspection.

Explanation.- For the purposes of this sub-rule, reasonable time of not less than two hours on every working day shall be considered by the company.

- (2) Any such member, debenture holder, security holder or beneficial owner or any other person may require a copy of any such register or entries therein or return on payment of such fee as may be specified in the articles of association of the company but not exceeding ten rupees for each page. Such copy or entries or return shall be supplied within seven days of deposit of such fee.

4.1.8 Registers, etc., to be evidence: Section 95 of the Companies Act, 2013 provides that the registers, their indices and copies of annual returns maintained under sections 88 and 94 shall be prima facie evidence of any matter directed or authorised to be inserted therein by or under this Act.

Preservation of register of members etc. and annual return - Rules lay the following manner in which the register and annual return may be preserved-

- (1) **Preservation and the custody:** The register of members along with the index shall be preserved permanently and shall be kept in the custody of the company secretary of the company or any other person authorized by the Board for such purpose; and
- (2) **Period of preservation:** The register of debenture holders or any other security holders along with the index shall be preserved for a period of eight years from the date of redemption of debentures or securities, as the case may be, and shall be kept in the custody of the company secretary of the company or any other person authorized by the Board for such purpose.
- (3) **Preservation of copies, certificates and documents of annual returns:** Copies of all annual returns prepared under section 92 and copies of all certificates and documents required to be annexed thereto shall be preserved for a period of eight years from the date of filing with the Registrar.
- (4) **Preservation of foreign register:** The foreign register of members shall be preserved permanently, unless it is discontinued and all the entries are transferred to any other foreign register or to the principal register. Foreign register of debenture holders or any

other security holders shall be preserved for a period of eight years from the date of redemption of such debentures or securities.

- (5) **Custody of foreign register:** The foreign register shall be kept in the custody of the company secretary or person authorised by the Board.
- (6) **Filing of copy of proposed resolution in advance:** A copy of the proposed special resolution in advance to be filed with the registrar as required in accordance with first proviso of sub-section (1) of section 94, shall be filed with the Registrar, at least one day before the date of general meeting of the company.

4.2 Annual General Meeting

(1) Section 96 provides that every company (other than a One Person Company) must hold in each year a general meeting in addition to any other meetings as its annual general meeting (AGM).

Notice of AGM: The notice of the AGM shall specify the meeting as such in the notices calling it.

Interval between two AGM: Not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next. Thus, there can be a maximum interval of 15 months between two AGMs.

Further, the AGM shall be held within a period of six months, from the date of closing of the financial year.

First Annual General Meeting: In case of the first annual general meeting, it shall be held within a period of nine months from the date of closing of the first financial year of the company

Provided further that if a company holds its first annual general meeting as aforesaid, it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation.

Extension for conducting AGM: The Registrar may, for any special reason, extend the time within which any AGM, shall be held, by a period not exceeding three months. However, the Registrar cannot provide extension in case of the First AGM.

Date, time and place of AGM: Every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated.

However, the Central Government may exempt any company from the fulfillment of above requirement related to date, time and place, subject to such conditions as it may impose.

Thus, it can be concluded that-

Time of AGM: During business hours - 9 a.m. and 6 p.m.

Day of AGM: Any day. But it shall not be a National holiday.

Here, "National Holiday" means and includes a day declared as National Holiday by the Central Government.

Place of AGM: AGM shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated.

(2) According to section 129(2) of the Companies Act, 2013, the Board of Directors of the company shall at every AGM, lay before the meeting financial statements for the financial year.

Further, section 129(3) of the Companies Act, 2013, provides that where a company has one or more subsidiaries, it shall, in addition to financial statements provided under section 129(2), prepare a consolidated financial statement of the company and of all the subsidiaries in the same form and manner as that of its own which shall also be laid before the AGM of the company along with the laying of its financial statement under section 129(2).

The following example will explain the position: *The financial year of a company ends on 31st December each year. The annual general meeting to adopt the accounts, etc. of the year ending 31st December, 1991 was held on 29th June, 1992. Under Section 96, the next annual general meeting need not be held until 29th September, 1993, but the accounts would be those, up to 31st December, 1991 which is more than six months before the date of the meeting. Therefore the last date for holding that meeting would be 30th June, 1993.*

Thus in fixing the date of the annual general meeting, Section 96 must be considered. Sections 96 clearly suggest that the Annual General Meeting should be held on the earliest of the three relevant dates i.e., six months after the close of the financial year, fifteen months from the previous Annual General Meeting and the last day of the next calendar year, whichever is earlier. [*B.N. Viswanathan Vs. Assistant Registrar of Joint Stock Companies, Madras (1953) 23 Comp. Cas. 63; AIR 1953 Mad 558; Sevaram Pansari Vs. Registrar of Companies (1964) 34 Comp.Cas.31*]

Default in holding annual general meeting: If an offence is committed by a company by not holding an annual general meeting in accordance with Section 166(corresponding section 96 of the Companies Act, 2013), or in not complying with any directions of the Central Government it will render the company and every officer of the company who is in default, punishable with fine which may extend to ₹ 50,000 and in the case of a continuing default with further fine which may extend to ₹ 2,500 for every day after the first day which such default continued, (Section 168).

[Note: The corresponding section 99 of the Companies Act, 2013 is not yet notified. Till then section 168 of the Companies Act, 1956 will be read with respect to default in holding of AGM. For the reference for reference of Section 99 see the annexure]

The Company Law Board may, notwithstanding any thing in this Act, or in the Articles of the company, on the application of any member of the company, call or direct the calling of a general meeting of the company and gives such ancillary or consequential directions as the

Company Law Board thinks expedient in relation to the calling, holding and conducting of the meeting. The directions, which the Company Law Board may give, include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting. A general meeting so held is deemed, subject to any directions of Company Law Board to be an annual general meeting of the company (Section 167).

[Note: The corresponding section 97 of the Companies Act, 2013 is not yet notified. Till then section 167 of the Companies Act, 1956 will be read with respect to the power of Central Government to call AGM. For the reference of Section 97 see the annexure]

4.3 Calling of extraordinary general meeting

There are, various matters in relation to administration of a company's affairs, which can be transacted only by resolutions of members in a general meeting. It is not always possible or expedient for consideration of such matters to wait until the next annual meeting. The Articles of Association of the company therefore make provisions for the convening of general meeting other than the annual general meeting. Such meetings are termed extraordinary general meetings (EGM).

Section 100 of the Companies Act, 2013 provides the law with respect to calling of extraordinary general meeting.

- (1) **When board may call EGM:** The Board may, whenever it deems fit, call an extraordinary general meeting of the company.
- (2) **Board on requisition of members:** The Board shall, at the requisition made by,—
 - (a) in the case of a **company having a share capital**, such number of members who hold, on the date of the receipt of the requisition, not less than one-tenth of such of the paid-up share capital of the company as on that date carries the right of voting;
 - (b) in the case of a **company not having a share capital**, such number of members who have, on the date of receipt of the requisition, not less than one-tenth of the total voting power of all the members having on the said date a right to vote,-call an extraordinary general meeting of the company within the period specified in subsection (4).
- (3) **Matter set out for consideration in requisition:** The requisition made as above, shall set out the matters for the consideration of which the meeting is to be called and shall be signed by the requisitionists and sent to the registered office of the company.
- (4) **Time period for calling the meeting:** The Board is required to proceed to call a meeting within 21 days from the date of receipt of requisition, to convene a meeting which should be held within 45 days of such deposit of the requisition with the company.

- (5) **Requisitionists to call the meeting on the failure of the Board:** If the Board fails to call the EGM in the time period provided then the requisitionists may call an EGM themselves within 3 months from the date of requisition.
- (6) A meeting by the requisitionists shall be called and held in the same manner in which the meeting is called and held by the Board.
- (7) **Reimbursement of expenses in calling a meeting:** Any reasonable expenses incurred by the requisitionists in calling a meeting, shall be reimbursed to the requisitionists by the company and the sums so paid shall be deducted from any fee or other remuneration payable (under section 197) to such of the directors who were in default in calling the meeting.

Calling of Extraordinary general meeting by requisitionists.- According to the Companies (Management and Administration) Rules, 2014, a requisitionists may call EGM in the following manner:

- (1) **Requisition for convening of EGM by members:** The members may requisition convening of an extraordinary general meeting in accordance with sub-section (4) of section 100, by providing such requisition in writing or through electronic mode at least clear twenty-one days prior to the proposed date of such extraordinary general meeting.
- (2) **Notice with details as to the place, date etc.:** The notice shall specify the place, date, day and hour of the meeting and shall contain the business to be transacted at the meeting.-

Explanation.- For the purposes of this sub-rule, it is here by clarified that requisitionists should convene meeting at Registered office or in the same city or town where Registered office is situated and such meeting should be convened on working day.

- (3) If the resolution is to be proposed as a special resolution, the notice shall be given as required by sub-section (2) of section 114.
- (4) **Notice to be signed:** The notice shall be signed by all the requisitionists or by a requisitionists duly authorised in writing by all other requisitionists on their behalf or by sending an electronic request attaching therewith a scanned copy of such duly signed requisition.
- (5) **No explanatory statement annexed to the notice:** No explanatory statement as required under section 102 need be annexed to the notice of an extraordinary general meeting convened by the requisitionists and the requisitionists may disclose the reasons for the resolution(s) which they propose to move at the meeting.
- (6) **Serving of notice of the meeting:** The notice of the meeting shall be given to those members whose names appear in the Register of members of the company within three days on which the requisitionists deposit with the Company a valid requisition for calling an extraordinary general meeting.

- (7) **No meeting convened:** Where the meeting is not convened, the requisitionists shall have a right to receive list of members together with their registered address and number of shares held and the company concerned is bound to give a list of members together with their registered address made as on twenty first day from the date of receipt of valid requisition together with such changes, if any, before the expiry of the forty-five days from the date of receipt of a valid requisition.
- (8) **Mode of giving notice:** The notice of the meeting shall be given by speed post or registered post or through electronic mode. Any accidental omission to give notice to, or the non-receipt of such notice by, any member shall not invalidate the proceedings of the meeting.

4.4 Powers of Company Law Board/ Tribunal

Guidance of Judicial Rulings: The main principles that should guide the Tribunal as regards ordering meeting to be called were indicated in *re, Ruttonjee & Co. Ltd.* (1968) 2 Comp. LJ 155 (1970) 40 Com. Cases 491 (Cal.):

- (i) The CLB/Tribunal would not ordinarily interfere with the domestic management of a company which should be conducted in accordance with the Articles.
- (ii) The discretion granted under Section 186 should be used sparingly with caution so that the CLB/Tribunal does not become either a shareholder or director of the company trying to participate in the internal squabbles of the company.
- (iii) The word 'impracticable' means impracticable from a reasonable point of view.
- (iv) The CLB/Tribunal should take a common sense view of the matter and must act as a prudent man of business.
- (v) A prudent man of business has not a sensitive officious view of intervention in case of every rivalry between two groups of directors; prudence demands that the CLB/Tribunal should ordinarily keep itself aloof from participating in quarrels of rival groups of directors or shareholders.
- (vi) But where the meeting can be called only by the directors and there are serious doubts and controversy as to who are directors or where there is a possibility that one or other or both the meetings called by the rival groups of directors may be invalid, the CLB/Tribunal ought not to expose the shareholders to uncertainties and should hold a position that has arisen which makes it "impracticable: to convene a meeting in any manner in which meeting of the company may be called.
- (vii) Before the CLB/Tribunal exercise its discretion under Section 186, the CLB/Tribunal must be satisfied when a director or a member moves an application, that it has been made *bona fide* in the larger interests of the company for removing a deadlock otherwise irremovable".

In Smt. Jain Vs. Delhi Flour Mills Company Ltd. and others (1974) 44 Comp. Cas. 228 (Delhi),

it was held that an application under Section 186 need not to on behalf of the company for the very language of that Section even permits the Company Law Board *suo moto* to call meeting of the company if it has become impracticable to call a meeting other than an annual general meeting. An action need not be in the name of the company for actions concerning injuries personal to the petitioner.

Where a meeting can be called by recourse to Section 169 or 167, the Company Law Board will not grant an application under Section 186; for the petitioner would at least have to show that there is no other option but to apply under Section 186.

In a petition under Section 186 for an order directing the holding of general meeting the CLB/Tribunal will not go to the extent of rectifying the register of members for the purpose of giving directions as to who should vote at such a meeting.

In B.R. Kundra Vs. Mohan Pictures Association (1976) 46 Comp. Cas. 339 (Delhi) it was held that:

Directors can not continue in office by failing to call annual general meeting at which they are to retire; where directors no longer continued to hold office as such, the court (now CLB/Tribunal) can call a meeting to elect directors.

In re. Motion Pictures Association (1979) 46 Comp. Cas.298 (Delhi), it was held that:

A meeting which is not conducted in accordance with the directions of the Company Law Board is not a meeting of a company under sub-section (2) of Section 186 and any business conducted in that meeting must fail.

In Indian Hardware Industries Ltd. Vs. S.K. Gupta (1981) 51 Comp. Cas. (Delhi), it was held that:

There is nothing in Section 186 which lays down that a Company Court which is supervising the scheme under Section 392 cannot call a meeting of the company if it feels that it is necessary to do so for the proper supervision and implementation of the scheme. So long as the meeting is to be called, because the Court feels it necessary for the proper working of the scheme, the power must be found to be implicit in the Court by virtue of Section 392(1) and it is not necessary to invoke Section 186 for this purpose. In other words, Section 186 is not applicable to cases covered by Section 392.

In Bengal & Assam Inventors Ltd. Vs. J.K. Eastern Industries (P) Ltd. (1957) 27 Comp. Cas 86 (Cal), it was held that:

The Company Law Board's power under Section 186 is discretionary. It is not a power which it must exercise. It is not a mandatory obligation upon the Company Law Board. It is an alternative remedy to be applied only when the normal machinery of company management fails and the Company Law Board must find firstly that it is impracticable to call a meeting and secondly that to leave the parties to follow their own remedies and rights will put the company in jeopardy.

[Note: Corresponding section to 186 of the Companies Act, 1956 is section 98 of the Companies Act, 2013 which is not yet notified. For reference of section 98 see the annexure]

4.5 Class Meetings

Meetings of members of a company fall into two broad divisions, namely, general meetings and class meetings. Class meetings are meeting of shareholders, holding a particular class of share which is held to pass resolution which will bind only the members of the class concerned. Only members of the class concerned may attend and vote at meeting. Usually the rules to voting apply to class meetings as they govern voting at general meetings. These class meetings must be convened whenever it is necessary to alter or change the rights or privileges of that class as provided by the articles. For effecting such changes, it is necessary that these are approved at a separate meeting of the holders of those shares and supported by a special resolution. Under section 48 of the Companies Act, 2013 (variation of shareholders' rights) class meeting of the holders of different classes of shares shall be held if the rights attaching to these shares are to be varied. Similarly, under Section 232 (Merger and Amalgamation of companies), where a scheme of arrangement is proposed, meeting of several classes of shareholders and creditors are required to be held.

4.6 Procedure for Convening and Conduct of General Meetings

The business at a meeting is said to have been "validly transacted" if the members of the organisation or body concerned, whether or not they were present, are bound by the decision made there at. They cannot be so bound unless the meeting is validly held. The essentials of a valid meeting are that the meeting should be:

- (a) *Properly convened*; i.e. a proper notice must be sent by the proper authority to every person entitled to attend.
- (b) *Properly constituted*, i.e. the proper person must be in the chair, the rules as to quorum must be observed, and the regulations governing the meeting must be complied with.
- (c) *Properly conducted*, i.e. the chairman must conduct the proceeding in accordance with the law relating to general meetings as per the Companies Act (Sections 101 to 109 of the Companies Act, 2013), the Company's own Articles of Association or, in respect of any specific matter, by the common law relating to meetings.

4.7 Notice of Meeting

The notice must be given by the proper summoning authority, which would normally be the Board of Directors. If however a notice has been issued without authority, the requisite authority may be given by ratification by the proper summoning authority before the meeting is held and notice may thus become good [*Hooper Vs. Kerr, Stuart & Co. (1900) 83 L.T. 729*].

Persons entitled to notice: Notice of the meeting shall be given:

- (a) to every member of the company, legal representative of any deceased member or the assignee of an insolvent member;

- (b) to the auditor or auditors of the company, and
- (c) every director of the company. [Section 101(3)]

The company cannot take notice of the beneficial owners of shares who are, therefore, not entitled to receive notice. Where, however, anyone is legally entitled to represent the member, such representative is entitled to receive the notice.

A private company, which is not, a subsidiary of a public company may prescribe, by its Articles, persons to whom the notice should be given.

It does not always follow that all the members of a company are entitled to receive notice of meetings of the company; the Articles frequently provide that preference shareholders shall not be entitled to receive notice of and vote at general meeting of the company, except in certain circumstances. There is a statutory obligation to send notice to preference shareholders when their dividend is in arrears for more than a certain period [Section 47(2)]. This obligation arises from the fact that preference shareholders whose dividends are in arrears are entitled to attend and vote at the meeting.

The non-receipt of notice or accidental omission to give notice to any member shall not invalidate the proceedings in the meeting [Section 101(4)]. However, omission to serve notice of meeting on a member on the mistaken ground that he is not a shareholder cannot be said to be an accidental omission [*Musselwhite Vs. C.H. Musselwhite & Sons Ltd.* (1962) 32 Comp. Cas 804]. 'Accidental omission' means that the omission must be not only designed but also not deliberate [*Maharaja Export Vs. Apparels Exports Promotion Council* (1986) 60 Comp. Cas 353].

Length of notice: According to section 101(1) of the Companies Act, 2013, a general meeting of a company may be called by giving not less than clear twenty-one days' notice either in writing or through electronic mode in such manner as may be prescribed.

However, section also provides that a general meeting may be called after giving a shorter notice if consent is given in writing or by electronic mode by not less than ninety-five per cent. of the members entitled to vote at such meeting.

The Delhi High Court held in *Bharat Kumar Dilwale Vs. Bharat Carbon and Ribbon Manufacturing Co. Ltd. and other* (1973) 43 Comp. Cas 197 that the expression "not less than 21 days notice" appearing in Section 101 of the Act implies a notice of 21 whole or clear days i.e. a period of 21 days excluding the day from which it ran and the day on which the notice expired. Part of the day, after the notice would be deemed to have been served, could not be added up to part of the day immediately before the timing of the meeting so as to construe one day. Each of the 21 days must be full or a clear day. Following the Supreme Court's interpretation of the expression "not less than one month" that the first day and the last day of the month had to be excluded, the day of service of the notice and the day of the meeting were excluded from the computation of 21 days.

Consider the following practical situation:

ABC Ltd. called its annual general meeting on 7th September, 2005. The notice of AGM was posted on 16th August, 2005. One member holding 20 shares wishes to challenge the resolutions passed at the AGM on the ground that the notice was not valid. What advice would you give to him?

According to Section 101(1) of the Companies Act, 2013, a general meeting of a company may be called by giving not less than 21 days notice in writing. Not less than 21 days means 21 clear days i.e. excluding both the date on which the notice was served and the date of the meeting. In case the notice of the general meeting is sent by post, service of notice of the meeting shall be deemed to have been effected at the expiry of 48 hours after it was posted. In the instant case, the notice was short of two days as per the section:

16 th August to 7 th September	23 days
Less date of service and date of meeting	2 days
	21 days
Less 48 hours from the time of its posting	2 day
	19 days

Therefore, the meeting was invalid and the resolutions passed were invalid. However in case of Annual General Meeting, where all members entitled to vote consent, the meeting may be held on shorter notice.

However, there are different High Court judgments relating to the question as to whether the requirement as to the period of notice is directory or mandatory.

In *Saliesh Harilal Shah v. Matushree Textiles Ltd. (1994) 2CLJ, 291*, the Bombay High Court [in contrast to the Madras High Court decision in *N. Chettair(v) the Madras Race Club (1951)*] held that the requirement of the section as length of notice is directory only and not mandatory. A couple of shareholders cannot be permitted to defeat the interest of the large body of shareholders by saying that the duration of the notice was not sufficient even if the short notice does not indicate any prejudice to the complaining shareholders.

In this problem, the member may be advised to explore whether he has suffered any prejudice by the short notice before proceeding to challenge the validity of the resolutions.

A general meeting may be called after giving a shorter notice if consent is given in writing or by electronic mode by not less than ninety-five per cent. of the members entitled to vote at such meeting. [Section 101(1)]. Note that all members can similarly agree to the accounts being sent to them not less than 21 days before the annual general meeting [Section 136(1)].

It may be noted that *consent means 'consent of members entitled to attend and vote' and 'not of members entitled to vote and present'*. Under the Section 101 It would be seen that the requirement as to 21 days 'notice may be dispensed with by agreement of the members, entitled to attend and vote and not merely of the members entitled to vote and present in person or proxy at the meeting. It, therefore, requires an agreement by not less than ninety-

five per cent. of the members entitled to vote at such meeting in order to dispense with the requirement of 21 days notice. The section, in other words, indicates the intention on the part of the Legislature that the provision is mandatory and that it can be dispensed with only by the agreement of the members. It is not enough that the members present at the meeting indicated either expressly or impliedly that they consented to or acquiesced in shortening the period of notice [*N.O.R Nagappa Chettiar Vs. Madras Race Club (1949) 19 Comp. Cas.*].

According to the section 136 of the Companies Act, 2013 statement of account, auditors's report together with all necessary annexures or attachments can be sent to members not less than 21 days before the date of meeting. The formalities prescribed by Sections 101 and 136 are independent of one another, the copies of the documents referred to in Section 136 are to be despatched also to persons other than those entitled to receive the notice of the general meeting. Moreover, consideration of annual accounts, etc., cannot be treated as identical and hence at par with the consideration of other business coming before the shareholders. Therefore, the shareholders must be given sufficient time to peruse the documents mentioned in Section 136.

If a meeting is called without notice to a shareholder the omission not being accidental, it is invalid and all proceedings therein are also invalid. A meeting was convened for December, 1969 but deliberately notice of the meeting was not sent to S and his wife. At that meeting B and S were elected as directors, but were to hold office only till April, 1970. In the next meeting, S was not elected and B and his wife were elected as directors. The contention of S was that since the meeting of December, 1969 was invalid, the meeting of 1970 was also invalid and so were the appointments of B and his wife. The omission to send the notice was not accidental.

Held that all the proceedings of April, 1970 meeting suffered from the infirmity of the December, 1969 meeting being invalid, and could not confer any legitimacy on the proceedings held at the alleged meeting of April, 1970. Any proceedings at this meeting of April, 1970 would be obviously unauthorised and illegal [*Eastern Linkers (P) Ltd. Vs. Dina Nath Sodhi (1984) 55 Comp. Cas 462 (Delhi)*].

Service of notice: The notice may be served personally or sent through post to the registered address of the members and in the absence of any registered office in India, to the address, if there be any, within India furnished by him to the company for the purpose of serving notice to him or through electronic mode. Service through post shall be deemed to have effected by correctly addressing, preparing and posting the notice. If, however, a member wants the notice to be served on him under a certificate or by registered post with or without acknowledgment due and has deposited money with the company to defray the incidental expenditure therefore, the notice must be served accordingly; otherwise service will not be deemed have been effected. Service on the joint holder may made by serving it on the one whose name appears first in the register of members. Service of notice shall be deemed to have been effected in the case of notice of meeting on the expiry of 48 hours since the posting of the same. When a notice is advertised in a news paper circulating in the neighbourhood of the

registered office of the company, it is regarded as having been served on day on which the advertisement appears, on every member having no registered address in India and who has not supplied to the company an address within India for giving notice to him. Note that Section 20 applies to all documents and not merely service of notice of meetings.

According to the Companies **(Management and Administration)** rules, 2014, the company may serve the notice in electronic mode in following manner.

- (1) A company may give notice through **electronic mode**. The expression “electronic mode” shall mean any communication sent by a company through its authorized and secured computer programme which is capable of producing confirmation and keeping record of such communication addressed to the person entitled to receive such communication at the last electronic mail address provided by the member.
- (2) A notice may be sent through **e-mail** as a text or as an attachment to e-mail or as a notification providing electronic link or Uniform Resource Locator for accessing such notice.
 - (i) The e-mail shall be **addressed to the person entitled to receive such e-mail** as per the records of the company or as provided by the depository:
Provided that the company shall provide an advance opportunity atleast once in a financial year, to the member to register his e-mail address and changes therein and such request may be made by only those members who have not got their email id recorded or to update a fresh email id and not from the members whose e-mail ids are already registered.
 - (ii) The **subject line in e-mail** shall state the name of the company, notice of the type of meeting, place and the date on which the meeting is scheduled.
 - (iii) If **notice is sent in the form of a non-editable attachment to e-mail**, such attachment shall be in the Portable Document Format or in a non-editable format together with a 'link or instructions' for recipient for downloading relevant version of the software.
 - (iv) When **notice or notifications of availability of notice are sent by e-mail**, the company should ensure that it uses a system which produces confirmation of the total number of recipients e-mailed and a record of each recipient to whom the notice has been sent and copy of such record and any notices of any failed transmissions and subsequent re-sending shall be retained by or on behalf of the company as “proof of sending”.
 - (v) The **company's obligation shall be satisfied when it transmits the e-mail** and the company shall not be held responsible for a failure in transmission beyond its control.

- (vi) If a **member entitled to receive notice fails to provide or update relevant e-mail address to the company**, or to the depository participant as the case may be, the company shall not be in default for not delivering notice via e-mail.
- (vii) The **company may send e-mail** through in-house facility or its registrar and transfer agent or authorise any third party agency providing bulk e-mail facility.
- (viii) The **notice made available on the electronic link or Uniform Resource Locator** has to be readable, and the recipient should be able to obtain and retain copies and the company shall give the complete Uniform Resource Locator or address of the website and full details of how to access the document or information.
- (ix) **The notice** of the general meeting of the company shall be simultaneously **placed on the website of the company** if any and on the website as may be notified by the Central Government.

Explanation.- For the purpose of this rule, it is hereby declared that the extra ordinary general meeting shall be held at a place within India.

Where a person refuses to accept notice served by registered post, under section 27 of the General Clauses Act, such tender of the registered cover and his refusal to accept the same is valid service, in accordance with law [*Joginder Singh Palta Vs. Time Travel (.P) Ltd. (1984) 56 Comp. Cas. 103 (Cas)*].

Where the photocopy of the purported notice of two meetings, one of the board of directors and another an extraordinary general meeting of the company to consider the removal of a permanent director, was sent to the permanent director under certificate of posting despite protests by the said director by registered acknowledgment due post that he had not been receiving notices of meetings, it was held that such notice was not properly served and meetings either could not be held or if they were held there was no proper notice to the director and hence the meetings were invalid. [*Tarlok Chand Khanna Vs. Raj Kumar Kapoor (1983) 54 Comp. Cas 12 (Delhi)*].

It should be noted that an improper or insufficient notice, as well as absence of notice, may affect the validity of a meeting and render the resolutions passed at the meeting ineffective [*See Boschoek Proprietary Company Vs. Fuxe (1906) 1 Ch.148; Bailu Vs. Oriental # Company (1915) 1 Ch.503*]. But the accidental omission to give notice does not invalidate proceedings at meeting [Section 101(4)]. The requirement of 21 days notice is not mandatory and an accidental omission to give a notice of less than 21 days 'does not invalidate the meeting.

The annual general meeting for 1980-81 and 1981-82 were convened on 7-10-1983 belatedly and with great difficulty. The notice of the meeting was published in a newspaper of Calcutta on 12-9-1983. The shareholders received the notice 22-9-1983 which was shown to have been posted on 16-9-1983. The notice was dated 9-9-1983. D sought an injunction that the resolutions passed at the meetings are not given effect to, on the ground that the notice was received by him on 22-9-1983. D held only seven shares of ₹ 10 in the company and was a resident of Calcutta where the meeting was to be held. He was not prejudiced by the short notice in anyway. The question

was whether the shortness of the notice invalidated the meeting.

Held that Section 101(1) makes it abundantly clear that it is not a condition precedent to the holding of the annual general meeting of a company that a clear 21 days' notice must be given to each and every member of the company. The accidental omission to give notice to any member or non-receipt of notice by any member shall not invalidate the proceedings at the meeting. If the contention of D was to be upheld it would mean that whereas if the notice to a shareholder was not accidentally posted at all, the proceedings at the annual general meeting of a company would be valid, but if the notice was posted accidentally less 21 days before the meeting, the proceedings at the meeting will be void even though the shareholder received the notice in good time before the meeting was held and actually attended the meeting. Hence, such a construction would lead to absurdity and should be avoided. The contention could not, therefore be accepted that a short notice served on member will invalidate meeting altogether but non-receipt of the notice by a member will not have the same effect. In view of the clear provisions of Section 101, it cannot be said that the requirements of Section 101 are mandatory and a short notice given to any member will render the entire meeting void and of no legal consequence even if that the member has not suffered any prejudice in any way. On the facts of the case that the notice of the meetings was published in a newspaper in good time, the shareholder was a resident of Calcutta; advertisement was given in a newspaper having circulation in Calcutta the two annual meetings were held at Calcutta; the shareholder had not been able to make out any case of any prejudice at all; and that two annual meetings were at last held after protracted litigations, there was no reason why the resolutions passed at the annual general meeting should not be given effect to merely because one shareholder having 7 shares of ₹ 10 actually each received the individual notices less than 21 days in advance. The balance of convenience did not required an order of injunction [*Calcutta Chemical Co. Ltd. Vs. Chandra Roy (1985) 58 Comp. Cas 275 (Cal)*]. Further if a notice of meeting is published as a newspaper advertisement, the statement of material facts, referred to in Section 102, need not be annexed, but the fact that the statement shall be forwarded must be mentioned.

Contents of notice: Every notice of a meeting shall specify the place, date, day and the hour of the meeting and shall contain a statement of the business to be transacted at such meeting. Section 102 of the Companies Act, 2013 provide that a statement setting out all the material facts concerning each item of special business to be transacted at a general meeting shall be annexed to the notice calling such meeting.

(1) **Material facts related to special business:** According to section 102 of the Companies Act, 2013, following are the material facts-

- (a) the nature of concern or interest, financial or otherwise, if any, in respect of each items of—
 - (i) every director and the manager, if any;
 - (ii) every other key managerial personnel; and

- (iii) relatives of the persons mentioned in sub-clauses (i) and (ii);
- (b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.
- (2) **Special Business:** For the purposes of sub-section (1),—
 - (a) in the case of an annual general meeting, all business to be transacted thereat shall be deemed special, other than—
 - (i) the consideration of financial statements and the reports of the Board of Directors and auditors;
 - (ii) the declaration of any dividend;
 - (iii) the appointment of directors in place of those retiring;
 - (iv) the appointment of, and the fixing of the remuneration of, the auditors; and
 - (b) in the case of any other meeting, all business shall be deemed to be special:

Section further says that, where any item of special business to be transacted at a meeting of the company relates to or affects any other company, the extent of shareholding interest in that other company of every promoter, director, manager, if any, and of every other key managerial personnel (KMP) of the first mentioned company shall, if the extent of such shareholding is not less than two per cent. of the paid-up share capital of that company, also be set out in the statement.

(3) **Details of time and place of inspection of documents given in the statement:** Where any item of business refers to any document, which is to be considered at the meeting, the time and place where such document can be inspected shall be specified in the statement under sub-section (1).

(4) **Non-disclosure or insufficient disclosure in any statement:** Where as a result of the non-disclosure or insufficient disclosure in any statement referred to in sub-section (1), being made by a promoter, director, manager, if any, or other key managerial personnel, any benefit which accrues to such promoter, director, manager or other key managerial personnel or their relatives, either directly or indirectly, the promoter, director, manager or other key managerial personnel, as the case may be, shall hold such benefit in trust for the company, and shall, without prejudice to any other action being taken against him under this Act or under any other law for the time being in force, be liable to compensate the company to the extent of the benefit received by him.

(5) **Default in compliance:** If any default is made in complying with the provisions of this section, every promoter, director, manager or other key managerial personnel who is in default shall be punishable with fine which may extend to fifty thousand rupees or five times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is more.

A notice must clearly specify the business, which is to be transacted at the meeting to which the

notice relates; otherwise the notice would be bad. It should make a full and frank disclosure to the shareholders of the fact, on which they would be expected to vote. [*Tiessen Vs. Henderson (1889) 1 Ch. 861; Narayanlal Bansailal Vs. Manekji Patel Mfg. Company, 93, (Bom) L.R.556*].

Where the business to be transacted at the meeting is considered as special, an explanatory statement must be annexed to the notice convening the meeting setting out all material facts concerning each item of business, nature of the concern or interest, if any, of every director and the manager (Section 102). It must also state the time and place where the documents in respect of such items can be inspected. Where the special business relates to another company the extent of shareholding/ interest of every director, etc. is necessarily, to be disclosed only if the shareholding interest is not less than 2 % of the paid-up capital of that other company (Student should not confuse 'special business' with 'special resolution'). Where the statement annexed to the notice of the meeting contains full and frank disclosure of the material facts concerning each item of business must essentially depend upon the facts of each case. A very minor defect arising out of strict non-conformity with the provisions contained in Section 102 might not render the resolution null and void [*Joseph Michael Vs. Tranvancore Rubber & Tea Co. Ltd. (1986) 59 Comp. Cas.898 (Ker.)*].

The explanatory statement must give all facts, which have a bearing on the question on which shareholders have to form their judgement. The explanatory statement, which is required to be annexed under Section 102, is for the purpose of ensuring that all facts that have a bearing on the question on which shareholders have to form their judgement are brought to their notice. Company C had, at a meeting convened under Section 230, approved a scheme of amalgamation with company B. Later, some shareholders to consider alternative scheme in the interest of the company requisitioned an extraordinary general meeting. The explanatory statement did not mention any specific scheme, but it was contended by the requisition insist that in the two annual reports of the company there was a mention of proposal from M, for the lease of C's factory which had been sent for legal advice and, therefore, the shareholders must be deemed to be aware of the alternate scheme even though the explanatory statement did not specifically refer to this proposal of M. Further, the annual reports did not contain the scheme proposed by M. The question was whether the explanatory statement was insufficient and misleading.

Held that in the explanatory statement there was not even a reference to the proposal of M. If the purpose of calling the requisitioned meeting was to consider the scheme proposed by M, it should have been so stated. The explanatory statement was insufficient and misleading; The requirements of law were not complied with and all relevant facts in the present case, and the alternative schemes were not put before the shareholders fairly and, accordingly, the requisition for calling the impugned meeting was bad in law [*Centron Industrial Alliance Ltd. Vs. Pravin Kantilal Vakil (1985) 57 Comp. Cas.12 (Bom.)*].

Section 102 is designed to secure that facts having a bearing on the issue on which the shareholders have to form their judgement, are brought to the notice of the shareholders so that they can exercise intelligent judgement.

4.8 Special and Ordinary Business

When we refer to the business of the company, it may be special business or ordinary business. The following discussion may be useful to understand the meaning and statutory requirements stipulated to transact these businesses by the Companies Act. Section 114 of the Companies Act, 2013 provides of the requirements of passing ordinary or special resolution to transact the businesses.

- (1) **Ordinary resolution:** A resolution shall be an ordinary resolution if the notice required under this Act has been duly given and it is required to be passed by the votes cast, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote, if any, of the Chairman, by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes, if any, cast against the resolution by members, so entitled and voting.
- (2) **Special resolution:** A resolution shall be a special resolution when—
 - (a) the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;
 - (b) the notice required under this Act has been duly given; and
 - (c) the votes cast in favour of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, by members who, being entitled so to do, vote in person or by proxy or by postal ballot, are required to be not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.

If the notice convening the meeting (where at special business will be transacted) does not state the nature of the special business, the meeting would be deemed to have been convened irregularly. Consequently, that special business cannot be dealt with at the meeting. Where the notice convening an extraordinary general meeting had furnished insufficient particulars as to the special business to be transacted thereat, and the members passed a resolution at the meeting, the directors were restrained by the Court's injunction from acting on that resolution. This was because the insufficient particulars furnished prevented the members from preparing their mind prior to the meeting so that they could exercise their judgement at the meeting in proper manner [*Jain Vs. Kalinga Tubes, 1965 I.S.C.S 540: Pacific Coast Coal Mines Ltd. Vs. Arbuthnot 1917 A.C. 607*].

4.9 Quorum

Quorum means the minimum number of members who must be present in order to constitute a meeting and transact business thereat. Thus, quorum represents the number of members on whose presence the meeting of a company can commence its deliberations.

Section 103 of the Companies Act, 2013 provides the law with respect to the quorum for the meetings. Section provides that where the articles of the company do not provide for a larger number, there the quorum shall depend on number of members as on date of a meeting.

(a) in case of a **public company**,—

Quorum for the meeting	Number of members as on date of a meeting
5 members personally present	not more than one thousand
15 members personally present	more than one thousand but up to five thousand
30 members personally present	exceeds five thousand

(b) in the case of a **private company**, two members personally present, shall be the quorum for a meeting of the company.

Consequences of no quorum- If the quorum is not present within half-an-hour from the time appointed for holding a meeting of the company—

- (a) the meeting shall stand adjourned to the same day in the next week at the same time and place, or
- (b) to such other date and such other time and place as the Board may determine; or
- (c) the meeting, if called by requisitionists (under section 100), shall stand cancelled:

Notice of an adjourned meeting- Where the meeting stands adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine, there the **company shall give at least 3 days notice to the members** either individually or by publishing an advertisement in the newspapers.

No quorum in an adjourned meeting- If at the adjourned meeting also, a quorum is not present within half-an-hour from the time appointed for holding meeting, **the members present shall be the quorum**.

The words, personally present exclude proxies. However, the representative of a body corporate appointed under Section 113 or the representative of the President or a Governor of a State under Section 112 is a member 'personally present' for purpose of counting a quorum [*Re. Kelantan Coconut Estate Ltd. , 1920 W.N. 274*]. In case two or more corporate bodies who are members of a company are represented by single individual, each of the bodies corporate will be treated as personally present by the individual representing it. If, for instance, he represents three corporate bodies, his presence will be counted as three members being present in person for purposes of quorum. It has been held in a Scottish case that one individual may count as more than one member if he attends the meeting in more than one capacity, e.g. as a member holding shares in his own right and as a member entitled to vote in person in respect of a trust holding (*Neil McLeod & Sons Ltd., Petitioners, 1976 SC 16*).

Joint holders and quorum: In the case of joint holders it would seem *prima facie* that any one of them may be counted in a quorum. In an Australian case [*Re. Trans-Continental Hotel*

Ltd. (1947) SASR 49, It has been held that two joint holders are each members and are to be counted towards a quorum as two members personally present.

It should be noted that Act specifically provides that for certain purposes where two or more persons hold any shares jointly, they shall be counted only as one member, e.g. under Section 2(68)(ii) for the purposes of counting the number of members in a private company, and under Section 244 for the purposes of right to apply for relief in cases of oppression or mismanagement. If the articles do not provide anything to the contrary, it appears that two or more joint holders when personally present can be counted as so many members for the purpose of forming a quorum.

When quorum is immaterial: If all the members are present, it is immaterial that the quorum required is more than the total number of members [*Re. Express Engineering Works Ltd. (1920) Ch 466; Re Oxted Motor Co. Ltd. (1921) 3 KB 32*]. If, for example, the articles of a private company provide that four members personally present shall be a quorum, and the number of members is reduced to three then the question of quorum will not arise when all the three members attend a meeting.

The meeting cannot proceed with business in the absence of quorum. Unless the articles of the company provide otherwise, if within half-an-hour from the time appointed for holding the meeting of the company, quorum is not present then the meeting shall be dissolved, if it has been called upon by the requisition to the same day in the next week, at the same time and place, or to such other day and such other time and place as the Board may determine. If at such an adjourned meeting a quorum is not present within half-an-hour from the time appointed for the meeting, the members present shall constitute the quorum (Section 103). A single member present shall not constitute quorum at an adjourned meeting.

Effect of failure of a quorum: If no quorum is present, then there is no meeting and the proceedings are invalid [*Re Romford Canal Co. (1883) 24 Ch D 85*]. However, acts done creating rights in favour of third parties at a meeting without a quorum being present would not affect the rights of such third parties, provided they had no notice of the irregularity e.g. debentures issued at a meeting of directors where there was an insufficient quorum-*Re. Romford Canal*.

Examples:

- (i) *A general meeting of a public company was adjourned by the chairman for want of quorum. Fresh notice was not served for the adjourned meeting. Do you feel that notice is required for the adjourned meeting? Referring to the provisions of the Companies Act, 2013 state the minimum number of members required to be present in the adjourned meeting.*

Answer

As per section 103 of the companies Act, 2013, if within half an hour from the time appointed for holding a meeting for the company quorum is not present, the meeting, shall stand adjourned to the same day in the next week, at the same time and place. Fresh notice of not

less than 3 days shall be given by the company to the members individually or by publishing in the newspapers. Besides, no quorum is necessary in the adjourned meeting. Thus, the adjourned meeting in question is valid.

Section 103 of the Companies Act, 2013 stipulates that unless the articles of associations provide for a larger number, two members personally presented shall constitute quorum in the case of a private company. Hence, the private company may provide a larger number for quorum. The general principle is that if no quorum is present the meeting and proceedings are void. However, there can be situations when quorum becomes immaterial. If all the members are present, it is immaterial that the quorum required is more than the total number of members. [Re. Express Engineering Works Ltd. (1920) CH466].

- (ii) *Whether the following persons can be counted for the purposes of quorum in a general meeting of a public company (a) a person representing three member companies; (b) both the joint owners of shares or present at the meeting; (c) a single member present at the meeting.*

Answer

- (a) Unless the articles of a company provide for a larger number, five, fifteen or thirty members personally present depending upon the number of members as on date of meeting is, less than one thousand, ranging from 1000 to 5,000 or exceeding 5,000 respectively in the case of a public company shall be the quorum for a meeting of the company (section 103). Personally present excludes proxies. But a representative of a body corporate appointed under Section 113 is a member personally 'present' for purposes of counting of quorum. If one individual represents three member companies, his presence will be counted as three members being present in person for purpose of quorum [*Mac-Leod (Neil) & Sons Ltd.*].
- (b) For the purpose of quorum, joint shareholders will be collectively regarded as one shareholder. However in an Australian Case (*Re. Trans-Continental Hotel Ltd.*), it has been held that two joint holders are each members and are to be counted towards a quorum as two members personally present.

The Companies Act specifically provides for certain purposes e.g. under Section 2(68)(ii) and under section 244 where two or more persons hold shares jointly they shall be counted only as one member. If the articles do not provide anything to the contrary, it appears that two or more joint holders when personally present can be counted as so many members for the purpose of forming quorum.

- (c) The word 'meeting' literally means a coming of together of two or more persons and generally more than one person will be necessary to constitute a meeting [*Mac-leod (Neil) & Sons Ltd.*]. But there may be cases where the constitution of a company may be such as, for instance, where one person holds all the equity shares of a class or all the preference shares so that there can be no meeting of more than one voting shareholder or one member of a particular class of shares. In such cases, it must be presumed that

the Act contemplates positions where a meeting of two or more persons will not be possible in the strict sense and the word 'meeting' must be taken to have been used in the sense of a function which can be performed by one person also as effectively as by two or more (*East v. Bennet Bros. Ltd.*). Apart from these special circumstances, there is an express provision in the Companies Act where a single member will constitute a meeting. Section 167 empowers the CLB to call annual general meeting of a company. Section 186 empowers CLB to order a meeting of the company, other than an annual general meeting. In both these cases, the CLB may issue directions in relation to the calling, holding and conducting of the meeting. The directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

[Note: Corresponding sections of sections 167 and 186 of the Companies Act, 1956 is sections 97 and 98 of the Companies Act, 2013, which is not yet notified. Till then the sections of the Companies Act, 1956 shall be referred]

(iii) *The Articles of Associations of X Ltd. require the personal presence of six members to constitute quorum of General Meeting. The following persons were present at the time of commencement of an Extraordinary General Meeting to consider the appointment of Managing Director:*

- (i) *Mr. G. the representative of Governor of Gujarat*
- (ii) *Mr. A and Mr. B, shareholders of Preference Shares.*
- (iii) *Mr. L. representing M Ltd., N Ltd. and X Ltd.*
- (iv) *Mr. P, Mr. Q, Mr. R and Mr. S who were proxies of Shareholders.*

Can be said that quorum was present? Discuss.

Quorum means the minimum number of members that must be personally present in order to constitute a meeting and transact business thereat. Thus, quorum represents the number of members on whose presence the meeting of a company can commence its deliberations. According to Section 103, of the Companies Act, 2013, unless the Articles provide for larger number, 5, 15, 30 members, personally present depending upon the number of members as on date of meeting, less than 1000, from 1000 to 5000 or exceeding 5000 respectively in the case of a public company and two in the case of any other company form the quorum for a general meeting. In this case, the Articles provide for six.

The word 'personally present' exclude proxies. However, the representative of a body corporate appointed under Section 113 or the representative of the President or a Governor of State under Section 112 is a member 'personally present' for purpose of counting a quorum. In case two or more corporate bodies who are members of a company are represented by a single individual, each of the bodies corporate will be treated as personally present by the individual representing it. If, for instance, he represents three corporate bodies, his presence will be counted as three members being present in person for purposes of quorum.

The quorum of members, personally present means the presence of the members who are called to vote in the meeting. Preference shareholders can vote only in relation to the matters affecting the rights of preference shares. In the extra ordinary general meeting in question, only the appointment of the managing director has to be considered. It is not a matter affecting the right of preference shares and the preference shareholders are not entitled to vote and hence, they cannot be considered as "members personally present" for the purpose of quorum.

Thus, the number of persons being personally present would be as follows:

Present personally	Number
Mr. G	1
Mr. A and Mr. B	Nil
Mr. L	3
Proxies	Nil
Total	4

It can therefore be said that quorum was not present.

4.10 Voting and the right to demand a Poll

Restriction on voting rights: Section 106 of the Companies Act, 2013 puts certain restriction on the exercising of voting rights. According to the section, the company may by its articles provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which the company has exercised any right of lien. A company shall not prohibit any member from exercising his voting right on any other ground except the given one.

On a poll taken at a meeting of a company, a member entitled to more than one vote, or his proxy, where allowed, or other person entitled to vote for him, as the case may be, need not, if he votes, use all his votes or cast in the same way all the votes he uses.

Voting by show of hands: According to section 107 of the Companies Act, 2013, that the voting shall be decided on a show of hands. The section says that-

(1) At any general meeting, a resolution put to the vote of the meeting shall, unless a poll is demanded under section 109 or the voting is carried out electronically, be decided on a show of hands.

(2) A declaration by the Chairman of the meeting of the passing of a resolution or otherwise by show of hands under sub-section (1) and an entry to that effect in the books containing the minutes of the meeting of the company shall be conclusive evidence of the fact of passing of such resolution or otherwise.

Voting through electronic means: According to section 108 of the Companies Act, 2013, the Central Government may prescribe the class or classes of companies and manner in

which a member may exercise his right to vote by the electronic means. The provisions seek to ensure wider shareholders participation in the decision making process in companies.

Vide Notification dated 19th March, 2015, Central Government further amended the Companies (Management and Administration) Rules, 2014 by issuing the Companies (Management and Administration) Amendment Rules, 2015 replacing the rule 20 of the Companies (Management and Administration) Rules, 2014. Rule 20 deals with the Voting through electronic means.

"Voting through electronic means" shall apply in respect of the general meetings for which notices are issued on or after the date of commencement of this rule.

Companies providing its members to exercise right to vote by electronic means- Every company other than a company referred to in Chapter XB or Chapter XC of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 having its equity shares listed on a recognised stock exchange or a company having not less than one thousand members, shall provide to its members facility to exercise their right to vote on resolutions proposed to be considered at general meetings by electronic means.

Explanation – For the purposes of this rule, the expression-

(i) "agency" means the National Securities Depository Limited, the Central Depository Services (India) Limited or any other entity approved by the Ministry of Corporate Affairs subject to the condition that the National Securities Depository Limited, the Central Depository Services (India) Limited or such other entity has obtained a certificate from the Standardisation Testing and Quality Certification Directorate, Department of Information Technology, Ministry of Communications and Information Technology, Government of India including with regard to compliance with parameters specified under Explanation (vi);

(ii) "cut-off date" means a date not earlier than seven days before the date of general meeting for determining the eligibility to vote by electronic means or in the general meeting;

(iii) "cyber security" means protecting information, equipment, devices, computer, computer resource, communication device and information stored therein from unauthorised access, use, disclosures, disruption, modification or destruction;

(iv) "electronic voting system" means a secured system based process of display of electronic ballots, recording of votes of the members and the number of votes polled in favour or against, in such a manner that the entire voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralised server with adequate cyber security;

(v) "remote e-voting" means the facility of casting votes by a member using an electronic voting system from a place other than venue of a general meeting;

- (vi) "secured system" means computer hardware, software, and procedure that-
- (a) are reasonably secure from unauthorised access and misuse;
 - (b) provide a reasonable level of reliability and correct operation;
 - (c) are reasonably suited to performing the intended functions; and
 - (d) adhere to generally accepted security procedures;
- (vii) "voting by electronic means" includes "remote e-voting" and voting at the general meeting through an electronic voting system which may be the same as used for remote e-voting.
- (3) A member may exercise his right to vote through voting by electronic means on resolutions referred to in sub-rule (2) and the company shall pass such resolutions in accordance with the provisions of this rule.
- (4) Procedure- A company which provides the facility to its members to exercise voting by electronic means shall comply with the following procedure, namely:-
- (i) Notice of meeting- The notice of the meeting shall be sent to all the members, directors and auditors of the company either-
 - (a) by registered post or speed post; or
 - (b) through electronic means, namely, registered e-mail ID of the recipient; or
 - (c) by courier service;
 - (ii) the notice shall also be placed on the website, if any, of the company and of the agency forthwith after it is sent to the members;
 - (iii) the notice of the meeting shall clearly state -
 - (a) that the company is providing facility for voting by electronic means and the business may be transacted through such voting;
 - (b) that the facility for voting, either through electronic voting system or ballot or polling paper shall also be made available at the meeting and members attending the meeting who have not already cast their vote by remote e-voting shall be able to exercise their right at the meeting;
 - (c) that the members who have cast their vote by remote e-voting prior to the meeting may also attend the meeting but shall not be entitled to cast their vote again;
 - (iv) the notice shall -
 - (a) indicate the process and manner for voting by electronic means ;
 - (b) indicate the time schedule including the time period during which the votes may be cast by remote e-voting;

- (c) *provide the details about the login ID;*
- (d) *specify the process and manner for generating or receiving the password and for casting of vote in a secure manner.*
- (v) *the company shall cause a public notice by way of an advertisement to be published, immediately on completion of dispatch of notices for the meeting under clause (i) of sub-rule (4) but at least twenty-one days before the date of general meeting, at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having country-wide circulation, and specifying in the said advertisement, inter alia, the following matters, namely:-*
 - (a) *statement that the business may be transacted through voting by electronic means;*
 - (b) *the date and time of commencement of remote e-voting;*
 - (c) *the date and time of end of remote e-voting;*
 - (d) *cut-off date;*
 - (e) *the manner in which persons who have acquired shares and become members of the company after the dispatch of notice may obtain the login ID and password;*
 - (f) *the statement that-*
 - (A) *remote e-voting shall not be allowed beyond the said date and time;*
 - (B) *the manner in which the company shall provide for voting by members present at the meeting; and*
 - (C) *a member may participate in the general meeting even after exercising his right to vote through remote e-voting but shall not be allowed to vote again in the meeting; and*
 - (D) *a person whose name is recorded in the register of members or in the register of beneficial owners maintained by the depositories as on the cut-off date only shall be entitled to avail the facility of remote e-voting as well as voting in the general meeting;*
 - (g) *website address of the company, if any, and of the agency where notice of the meeting is displayed; and*
 - (h) *name, designation, address, email id and phone number of the person responsible to address the grievances connected with facility for voting by electronic means:*

Provided that the public notice shall be placed on the website of the company, if any, and of the agency;

- (vi) *the facility for remote e-voting shall remain open for not less than three days and shall close at 5.00 p.m. on the date preceding the date of the general meeting;*

(vii) during the period when facility for remote e-voting is provided, the members of the company, holding shares either in physical form or in dematerialized form, as on the cut-off date, may opt for remote e-voting:

Provided that once the vote on a resolution is cast by the member, he shall not be allowed to change it subsequently or cast the vote again:

Provided further that a member may participate in the general meeting even after exercising his right to vote through remote e-voting but shall not be allowed to vote again;

(viii) at the end of the remote e-voting period, the facility shall forthwith be blocked:

Provided that if a company opts to provide the same electronic voting system as used during remote e-voting during the general meeting, the said facility shall be in operation till all the resolutions are considered and voted upon in the meeting and may be used for voting only by the members attending the meeting and who have not exercised their right to vote through remote e-voting.

(ix) the Board of Directors shall appoint one or more scrutinizer, who may be Chartered Accountant in practice, Cost Accountant in practice, or Company Secretary in practice or an Advocate, or any other person who is not in employment of the company and is a person of repute who, in the opinion of the Board can scrutinize the voting and remote e-voting process in a fair and transparent manner:

Provided that the scrutiniser so appointed may take assistance of a person who is not in employment of the company and who is well-versed with the electronic voting system;

(x) the scrutinizer shall be willing to be appointed and be available for the purpose of ascertaining the requisite majority;

(xi) the Chairman shall, at the general meeting, at the end of discussion on the resolutions on which voting is to be held, allow voting, as provided in clauses (a) to (h) of sub-rule (1) of rule 21, as applicable, with the assistance of scrutiniser, by use of ballot or polling paper or by using an electronic voting system for all those members who are present at the general meeting but have not cast their votes by availing the remote e-voting facility.

(xii) the scrutiniser shall, immediately after the conclusion of voting at the general meeting, first count the votes cast at the meeting, thereafter unblock the votes cast through remote e-voting in the presence of at least two witnesses not in the employment of the company and make, not later than three days of conclusion of the meeting, a consolidated scrutiniser's report of the total votes cast in favour or against, if any, to the Chairman or a person authorised by him in writing who shall countersign the same:

Provided that the Chairman or a person authorised by him in writing shall declare the result of the voting forthwith;

Explanation.- It is hereby clarified that the manner in which members have cast their votes, that is, affirming or negating the resolution, shall remain secret and not available to the Chairman, Scrutiniser or any other person till the votes are cast in the meeting.

(xiii) For the purpose of ensuring that members who have cast their votes through remote e-voting do not vote again at the general meeting, the scrutiniser shall have access, after the closure of period for remote e-voting and before the start of general meeting, to details relating to members, such as their names, folios, number of shares held and such other information that the scrutiniser may require, who have cast votes through remote e-voting but not the manner in which they have cast their votes:

(xiv) the scrutiniser shall maintain a register either manually or electronically to record the assent or dissent received, mentioning the particulars of name, address, folio number or client ID of the members, number of shares held by them, nominal value of such shares and whether the shares have differential voting rights;

(xv) the register and all other papers relating to voting by electronic means shall remain in the safe custody of the scrutiniser until the Chairman considers, approves and signs the minutes and thereafter, the scrutiniser shall hand over the register and other related papers to the company.

(xvi) the results declared along with the report of the scrutiniser shall be placed on the website of the company, if any, and on the website of the agency immediately after the result is declared by the Chairman :

Provided that in case of companies whose equity shares are listed on a recognised stock exchange, the company shall, simultaneously, forward the results to the concerned stock exchange or exchanges where its equity shares are listed and such stock exchange or exchanges shall place the results on its or their website.

(xvii) subject to receipt of requisite number of votes, the resolution shall be deemed to be passed on the date of the relevant general meeting.

Explanation.- For the purposes of this clause, the requisite number of votes shall be the votes required to pass the resolution as the 'ordinary resolution' or the 'special resolution', as the case may be, under section 114 of the Act.

(xviii) a resolution proposed to be considered through voting by electronic means shall not be withdrawn."

Demand for poll: Section 109 of the Companies Act, 2013 provides for the demand of poll before or on the declaration of the result of the voting on any resolution on show of hands. Accordingly, law says that-

- (1) **Order of demand for poll by the chairman of meeting:** Before or on the declaration of the result of the voting on any resolution on show of hands, a poll may be ordered to be taken by the Chairman of the meeting on his own motion, and shall be ordered to be taken by him on a demand made in that behalf,—

- (a) **in the case a company having a share capital**, by the members present in person or by proxy, where allowed, and having not less than one-tenth of the total voting power or holding shares on which an aggregate sum of not less than five lakh rupees or such higher amount as may be prescribed has been paid-up; and
 - (b) **in the case of any other company**, by any member or members present in person or by proxy, where allowed, and having not less than one-tenth of the total voting power.
- (2) **Withdrawal of the demand:** The demand for a poll may be withdrawn at any time by the persons who made the demand.
 - (3) A poll demanded for adjournment of the meeting or appointment of Chairman of the meeting shall be taken forthwith.
 - (4) A poll demanded on any question other than adjournment of the meeting or appointment of Chairman shall be taken at such time, not being later than forty-eight hours from the time when the demand was made, as the Chairman of the meeting may direct.
 - (5) **Appointment of persons to scrutinize the poll process:** Where a poll is to be taken, the Chairman of the meeting shall appoint such number of persons, as he deems necessary, to scrutinise the poll process and votes given on the poll and to report thereon to him in the manner as may be prescribed.
 - (6) **Chairman to regulate the conduct of poll:** Subject to the provisions of this section, the Chairman of the meeting shall have power to regulate the manner in which the poll shall be taken.
 - (7) **Poll deemed the decision of the meeting:** The result of the poll shall be deemed to be the decision of the meeting on the resolution on which the poll was taken.

Thus, it can be concluded that at any general meeting vote is taken in the first instance by a show of hands (Section 107); each member has one vote. The shareholders present at the meeting indicate their views by raising their hands. As voting by a show of hands may not always reflect the opinion of members upon a 'value' basis, Section 109 provides for the demand of a poll.

Before or on the declaration of the result of the voting on any resolution by a show of hands, the chairman may order *suo moto* that a poll be taken but when a demand for poll has been made, he must do so.

4.11 Proxies

A proxy is an instrument in writing executed by a shareholder authorising another person to attend a meeting and to vote thereat on his behalf and in his absence. The term is also applied to the person so appointed.

Proxies- Section 105 of the Companies Act, 2013 provides that a member, who is entitled to attend to vote, can appoint another person as a proxy to attend and vote at the meeting on his

behalf. This section also provides the manner of appointing proxy. The provision is as follows-

Law related to proxy-

- (1) Any member of a company who is entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf.
- (2) A proxy shall not have the right to speak at such meeting and shall not be entitled to vote except on a poll.
- (3) Unless the articles of a company otherwise provide, appointment of proxy shall not apply in the case of a company not having a share capital.
- (4) The section provides that the Central Government may prescribe a class or classes of companies whose members shall not be entitled to appoint another person as a proxy.
- (5) A person appointed as proxy shall act on behalf of such member or number of members not exceeding fifty and such number of shares as may be prescribed.

Procedure of appointment of proxy-

- (1) In every notice calling a meeting of a company which has a share capital, or the articles of which provide for voting by proxy at the meeting, there shall appear, a statement that a member is entitled to attend and vote is entitled to appoint a proxy, or, where that is allowed, one or more proxies, to attend and vote instead of himself, and that a proxy need not be a member.
- (2) If default is made in complying calling of meeting, every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees.
- (3) Any provision contained in the articles of a company which specifies or requires a longer period than forty-eight hours before a meeting of the company, for depositing with the company or any other person any instrument appointing a proxy or any other document necessary to show the validity or otherwise relating to the appointment of a proxy in order that the appointment may be effective at such meeting, shall have effect as if a period of forty-eight hours had been specified in or required by such provision for such deposit.
- (4) If for the purpose of any meeting of a company, invitations to appoint as proxy a person or one of a number of persons specified in the invitations are issued at the company's expense to any member entitled to have a notice of the meeting sent to him and to vote thereat by proxy, every officer of the company who knowingly issues the invitations as aforesaid or wilfully authorises or permits their issue shall be punishable with fine which may extend to one lakh rupees.

However, an officer shall not be punishable by reason only of the issue to a member at his request in writing of a form of appointment naming the proxy, or of a list of persons willing to act as proxies, if the form or list is available on request in writing to every member entitled to vote at the meeting by proxy.

- (5) The instrument appointing a proxy shall—
 - (a) be in writing; and
 - (b) be signed by the appointer or his attorney duly authorised in writing or, if the appointer is a body corporate, be under its seal or be signed by an officer or an attorney duly authorised by it.
- (6) An instrument appointing a proxy, if in the form as may be prescribed, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instrument by the articles of a company.
- (7) Every member entitled to vote at a meeting of the company, or on any resolution to be moved thereat, shall be entitled during the period beginning twenty-four hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting, to inspect the proxies lodged, at any time during the business hours of the company, provided not less than three days' notice in writing of the intention so to inspect is given to the company.

As per the Companies **(Management and Administration)** rules, 2014 following restrictions have been put with respect to appointment of proxies:

- (1) A member of a company registered under section 8 shall not be entitled to appoint any other person as his proxy unless such other person is also a member of such company.
- (2) A person can act as proxy on behalf of members not exceeding fifty and holding in the aggregate not more than ten percent of the total share capital of the company carrying voting rights:

Provided that a member holding more than ten percent, of the total share capital of the Company carrying voting rights may appoint a single person as proxy and such person shall not act as proxy for any other person or shareholder.

Representations of corporations at meetings of companies and creditors: Section 113 of the Companies Act, 2013 seeks to provide that where a body corporate is a member or creditor of the company, they may authorize a person to act as its representative in the meeting of the company. The Provision is as under-

- (1) **Appointment of a representative by a body corporate:** A body corporate, whether a company within the meaning of this Act or not, may, —
 - (a) **if it is a member of a company** -by resolution of its Board of Directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of the company, or at any meeting of any class of members of the company;
 - (b) **if it is a creditor, including a holder of debentures**, of a company-, by resolution of its directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of any creditors of the company held in

pursuance of this Act or of any rules made thereunder, or in pursuance of the provisions contained in any debenture or trust deed, as the case may be.

- (2) **Powers and rights of a authorised person:** A person authorised by resolution as above, shall be entitled to exercise the same rights and powers, including the right to vote by proxy and by postal ballot, on behalf of the body corporate which he represents as that body could exercise if it were an individual member, creditor or holder of debentures of the company.

Representation of the President and Governors in meeting of companies to which they are members: Section 112 of the Companies Act, 2013 provides that the President of India or the Governor of a State, if he is a member of a company, may appoint such person as he thinks fit to act as his representative at any meeting and shall be entitled to exercise the same rights and powers including the right to vote by proxy and postal ballot, as the President or, as the case may be, the Governor could exercise as a member of the company.

Consider the following practical situation and analyse:

M/s Happy Homes Ltd. had sent notices to all its members about the holding of the 5th Annual General Meeting to be held on 15th October, 2005 at 4.00 P.M. As per the notice the members who are unable to attend the meeting in person can appoint a proxy and the proxy forms duly filled should be sent so as to reach at least 48 hours before the meeting. Mr. A, a member of the company appoints Mr. P as his proxy and the proxy form dated 10.10.2005 was deposited by Mr. P with the company at its Registered Office on 11.10.2005. However, Mr. A changes his mind and on 12.10.2005 gives another proxy to Mr. Q and it was deposited on the same day with the company. Similarly another member Mr. B also gives to separate proxies to two individuals named Mr. R and Mr. S. In the case of Mr. R, the proxy dated 12.10.2005 was deposited with the company on the same day and the proxy form in favour of Mr. S was deposited on 14.10.2005. All the proxies viz., P, Q, R and S were present before the meeting. In the light of the relevant provisions of the Companies Act, who would be the persons allowed to represent at proxies for members A and B respectively?

A Proxy is an instrument in writing executed by a shareholder authorizing another person to attend a meeting and to vote thereat on his behalf and in his absence. As per, the provisions of Section 105 of the Companies Act, 2013 every shareholder who is entitled to attend and vote has a statutory right to appoint another person as his proxy and the proxy need not be a member of the company. Further, any provision in the articles of association of the company requiring instrument of proxy to be lodged with the company more than 48 hours before a meeting shall have effect as if 48 hours had been specified therein. The members has a right to revoke the proxy's authority by voting himself before the proxy has voted but once the proxy has voted the member cannot retract his authority. Where two proxy instruments by the same shareholder are lodged in respect of the same votes before the expiry of the time for lodging proxies, the second in time will be counted and where one is lodged before and the other after the expiry of the date fixed for lodging proxies, the former will be counted. Thus in case of Member A, the proxy Q (and not Proxy P) will be permitted to vote on his behalf. However, in

the case of Member B, the proxy R (and not Proxy S) will be permitted to vote as the proxy authorizing S to vote was deposited in less than 48 hours before the meeting.

4.12 Resolution

The purpose of a meeting is to arrive at decisions and the sense of a meeting is ascertained by voting upon proposals put to the meeting. A formal proposal put to the meeting is resolution. A company expresses its will by the mean of resolutions.

There are only two kinds of resolutions under the Act, ordinary and special, and they are defined in Section 114 of the Companies Act, 2013. Some writers classify resolutions into three types namely, ordinary, special and resolutions requiring special notice.

Ordinary Resolution: This is a motion passed by a simple majority of those present in person or by proxy where proxies are allowed and voting upon the resolution at a general meeting. Members not participating in voting are not taken into account. As distinguished from a simple majority, an absolute majority is a majority of all those entitled to vote whether they attend or not.

Section 114(1) defines an ordinary resolution as follows:

A resolution shall be an ordinary resolution if the notice required under this Act has been duly given and it is required to be passed by the votes cast, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote, if any, of the Chairman, by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes, if any, cast against the resolution by members, so entitled and voting.

Special Resolution: Apart from ordinary resolutions, various sections of the Act provide that certain things can be done by a company with the authority of a special resolution passed at a duly constituted general meeting. A special resolution is an artificial conception of the Act, requiring a larger majority than an ordinary resolution. It has been defined by Section 114(2) as follows:

A resolution shall be a special resolution when—

- (a) the intention to propose the resolution as a special resolution has been **duly specified in the notice calling the general meeting or other intimation** given to the members of the resolution;
- (b) the notice required under this Act has been duly given; and
- (c) the votes cast in favour of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, by members who, being entitled so to do, vote in person or by proxy or by postal ballot, **are required to be not less than three times the number of the votes**, if any, cast against the resolution by members so entitled and voting.

It is doubtful whether a resolution can take effect as a special resolution when the formalities

required by Section 114(2) have not been complied with even if it is agreed to by all the members of the company. There are no cases directly in point, and Section 114(2) should therefore be complied with;

The notice convening the meeting at which a special resolution is to be considered must set out the actual wording of the resolution, and also annex an explanatory statement as required under Section 102, in which the shareholders are informed of the material facts concerning the resolution and the nature of interest therein of the directors;

A printed or typewritten copy of the special resolution (together with a copy of the explanatory statement annexed under Section 102) duly certified under the signature of an officer of the company must be filed with Registrar of Companies within thirty days of its being passed (Section 117).

Acts for which special resolutions are required: Some matters may be so important and outside the ordinary course of the company's business, such as any important constitutional changes, that safeguards should be imposed to ensure that a larger majority than a simple majority of the members approve of them before they are given effect to.

In addition to the requirements of the Act, a company's own articles may prescribe for special resolution where under the Act only an ordinary resolution is necessary. However, where the Act specifies for a special resolution, the articles cannot provide for the different kind of resolution.

Resolution requiring special notice: According to section 115 of the Companies Act, 2013, where, by any provision contained in this Act or in the articles of a company, special notice is required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than one per cent. of total voting power or holding shares on which such aggregate sum not exceeding five lakh rupees, as may be prescribed, has been paid-up and the company shall give its members notice of the resolution in such manner as may be prescribed.

For example the matters in respect of which special notice is required are: (1) for appointment a person as auditor at the annual general meeting other than the retiring auditor for providing expressly that the retiring auditor shall not be re-appointed [Section 140(4)]; (2) for removing a director before the expiry of the period of his office and appointing some one in the place of the director so removed [Section 169(2)].

According to the Companies (Management and Administration) Rules, 2014-

1. **Signing of special notice:** A special notice required to be given to the company shall be signed, either individually or collectively by such number of members holding not less than one percent of total voting power or holding shares on which an aggregate sum of not more than five lakh rupees has been paid up on the date of the notice.

(Vide Notification G.S.R. 537(E), dated 24th July 2014, by the Companies(Management and Administration)Second Amendment Rules, 2014, in

rule 23 subrule(1), for the words “ not less than five lakh rupees”, the words “ not more than five lakh rupees” shall be omitted)

- (2) **Sending of notice to the company:** The notice referred to in sub-rule (1) shall be sent by members to the company not earlier than three months but at least fourteen days before the date of the meeting at which the resolution is to be moved, exclusive of the day on which the notice is given and the day of the meeting.
- (3) **On receipt of notice by the company:** The company shall immediately after receipt of the notice, give its members notice of the resolution at least seven days before the meeting , exclusive of the day of dispatch of notice and day of the meeting , in the same manner as it gives notice of any general meetings.
- (3) **Publication of notice :** Where it is not practicable to give the notice in the same manner as it gives notice of any general meetings, the notice shall be published in English language in English newspaper and in vernacular language in a vernacular newspaper, both having wide circulation in the State where the registered office of the Company is situated and such notice shall also be posted on the website, if any, of the Company. The notice shall be published at least seven days before the meeting, exclusive of the day of publication of the notice and day of the meeting.

Resolutions passed at adjourned meeting: According to section 116 of the Companies Act, 2013, where a resolution is passed at an adjourned meeting of—

- (a) a company; or
- (b) the holders of any class of shares in a company; or
- (c) the Board of Directors of a company,

then, the resolution shall, for all purposes, be treated as having been passed on the date on which it was in fact passed, and shall not be deemed to have been passed on any earlier date.

Resolutions and agreements to be filed: Section 117 of the Companies Act, 2013, provides that the resolutions and agreements in respect of the matters specified therein together with a explanatory statement shall be filed with the Registrar.

Following is the procedure with respect to the filing with the registrar-

- (1) **Filing of copy of resolution/any agreement:** A copy of every resolution or any agreement, in respect of matters specified in sub-section (3) together with the explanatory statement under section 102, if any, annexed to the notice calling the meeting in which the resolution is proposed, shall be filed with the Registrar within thirty days of the passing or making thereof in such manner and with such fees as may be prescribed within the period of 270 days (specified under section 403):

Provided that the **copy of every resolution which has the effect of altering the articles** and the copy of every agreement referred to in sub-section (3) shall be

embodied in or annexed to every copy of the articles issued after passing of the resolution or making of the agreement.

- (2) **Failure to file the resolution or the agreement:** If a company fails to file the resolution or the agreement under sub-section (1) before the expiry of the period specified under section 403 with additional fee, the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default, including liquidator of the company, if any, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.
- (3) **Applicability:** The provisions of this section shall apply to—
- (a) **special resolutions;**
 - (b) **resolutions which have been agreed to by all the members** of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions;
 - (c) **any resolution of the Board of Directors of a company** or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of appointment, of a managing director;
 - (d) **resolutions or agreements which have been agreed to by any class of members** but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by a specified majority or otherwise in some particular manner; and all resolutions or agreements which effectively bind such class of members though not agreed to by all those members;
 - (e) **resolutions passed by a company according consent to the exercise by its Board of Directors** of any of the powers under clause (a) and clause (c) of sub-section (1) of section 180;
 - (f) **resolutions requiring a company to be wound up voluntarily** passed in pursuance of section 304;
 - (g) resolutions passed in pursuance of sub-section (3) of section 179(Powers of Board); and
 - (h) **any other resolution or agreement as may be prescribed and placed in the public domain.**

Circulation of members' resolution and statements: Students should carefully note the circumstances in which the members can make use of the administrative machinery of a company for introducing resolutions for consideration at next annual general meeting or for circulation of statements in regard to any resolution to be proposed at an extraordinary general meeting or business to be dealt with at any general meeting. Such circumstances are stated below:

- (1) **Notice to members-** As per section 111 of the Companies Act, 2013, a company shall, on requisition in writing of such number of members, as required in section 100(Calling of EGM), give notice to members of any resolution which may properly be moved and is intended to be moved at a meeting; and circulate to members any statement with respect to the matters referred to in proposed resolution or business to be dealt with at that meeting.
- (2) **Exemption from serving notice-** A company shall not be bound under this section to give notice of any resolution or to circulate any statement, unless—
 - (a) a copy of the requisition signed by the requisitionists (or two or more copies which, between them, contain the signatures of all the requisitionists) is deposited at the registered office of the company,— (i) in the case of a requisition requiring notice of a resolution, not less than six weeks before the meeting; (ii) in the case of any other requisition, not less than two weeks before the meeting; and
 - (b) there is deposited or tendered with the requisition, a sum reasonably sufficient to meet the company's expenses in giving effect thereto.

Where however, after a copy of a requisition requiring notice of a resolution has been deposited at the registered office of the company, an annual general meeting is called on a date within six weeks after the copy has been deposited, the copy, although not deposited within the time required by this sub-section, shall be deemed to have been properly deposited for the purposes thereof.
- (3) **Exception from circulation of any statement-** The company shall not be bound to circulate any statement, if on the application either on behalf of the company or of any other person who claims to be aggrieved, then the Central Government, by order, declares that the rights conferred are being abused to secure needless publicity for defamatory matter.
- (4) **Order to bear the cost-** An order made may also direct that the cost incurred by the company shall be paid to the company by the requisitionists, notwithstanding that they are not parties to the application.
- (5) **Default in contravention of the provision-** If any default is made in complying with the provisions of this section, the company and every officer of the company who is in default shall be liable to a penalty of twenty-five thousand rupees.

4.13 Postal Ballot

Section 110 of the Companies Act, 2013, provides for the procedure to be followed by the company for ascertaining the views of the members by postal ballot. A company shall send a notice and draft resolution by registered post to all shareholders explaining the reasons and requesting them to send their assent or dissent in writing on a postal ballot.

"postal ballot" includes voting by shareholders by postal or electronic mode instead of voting

personally by presenting for transacting businesses in a general meeting of the company.

"requisite majority" with regard to special resolution means votes cast in favour of the business is three times more than the votes cast against, with regard to ordinary resolution, votes cast in favour is more than the votes cast against.

According to the section, a company—

- (a) shall, in respect of such items of business as the Central Government may, by notification, declare to be transacted only by means of postal ballot; and
- (b) may, in respect of any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting, transact by means of postal ballot, in such manner as may be prescribed, instead of transacting such business at a general meeting.

If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

The Companies (Management and Administration) Rules, 2014 lay the procedure to be followed for conducting business through postal ballot.-

- (1) **Notice to all shareholders:** Where a company is required or decides to pass any resolution by way of postal ballot, it shall send a notice to all the shareholders, along with a draft resolution explaining the reasons therefor and requesting them to send their assent or dissent in writing on a postal ballot because postal ballot means voting by post or through electronic means within a period of thirty days from the date of dispatch of the notice.

The notice shall be sent either (a) by Registered Post or speed post, or (b) through electronic means like registered e-mail id or (c) through courier service for facilitating the communication of the assent or dissent of the shareholder to the resolution within the said period of thirty days.

- (2) **Publishing of an advertisement:** An advertisement shall be published at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district, about having dispatched the ballot papers and specifying therein, *inter alia*, the following matters, namely:-
 - (a) a statement to the effect that the business is to be transacted by postal ballot which includes voting by electronic means;
 - (b) the date of completion of dispatch of notices;
 - (c) the date of commencement of voting;
 - (d) the date of end of voting;

- (e) the statement that any postal ballot received from the member beyond the said date will not be valid and voting whether by post or by electronic means shall not be allowed beyond the said date;
 - (f) a statement to the effect that members, who have not received postal ballot forms may apply to the company and obtain a duplicate thereof; and
 - (g) contact details of the person responsible to address the grievances connected with the voting by postal ballot including voting by electronic means.
- (3) **Notice also be placed on the website:** The notice of the postal ballot shall also be placed on the website of the company forthwith after the notice is sent to the members and such notice shall remain on such website till the last date for receipt of the postal ballots from the members.
- (4) **Appointment of scrutinizer:** The Board of directors shall appoint one scrutinizer, who is not in employment of the company and who, in the opinion of the Board can conduct the postal ballot voting process in a fair and transparent manner.
- (5) **Assent by the requisite majority to the resolution:** If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot including voting by electronic means, it shall be deemed to have been duly passed at a general meeting convened in that behalf.
- (6) **Postal ballot received to be kept under safe custody:** Postal ballot received back from the shareholders shall be kept in the safe custody of the scrutinizer and after the receipt of assent or dissent of the shareholder in writing on a postal ballot, no person shall deface or destroy the ballot paper or declare the identity of the shareholder.
- (7) **Submission of report of the scrutinizer:** The scrutinizer shall submit his report as soon as possible after the last date of receipt of postal ballots but not later than seven days thereof.
- (8) **Maintenance of register by the Scrutinizer:** The scrutinizer shall maintain a register either manually or electronically to record their assent or dissent received, mentioning the particulars of the shareholder and details of postal ballots which are received in defaced or mutilated form and postal ballot forms which are invalid.
- (9) **Preservation of postal ballots:** The postal ballot and all other papers relating to postal ballot including voting by electronic means, shall be under the safe custody of the scrutinizer till the chairman considers, approves and signs the minutes and thereafter, the scrutinizer shall return the ballot papers and other related papers or register to the company who shall preserve such ballot papers and other related papers or register safely.
- (10) **Reply from members:** The assent or dissent received after thirty days from the date of issue of notice shall be treated as if reply from the member has not been received.

- (11) **Declaration of result:** The results shall be declared by placing it, along with the scrutinizer's report, on the website of the company.
- (12) The resolution shall be deemed to be passed on the date of at a meeting convened in that behalf.
- (13) The provisions of rule 20 regarding voting by electronic means shall apply, as far as applicable, with the necessary changes to this rule in respect of the voting by electronic means.
- (14) **Transaction of business through postal ballot:** According to section 110(1)(a), the following items of business shall be transacted only by means of voting through a postal ballot-
 - (a) alteration of the objects clause of the memorandum and in the case of the company in existence immediately before the commencement of the Act, alteration of the main objects of the memorandum;
 - (b) alteration of articles of association in relation to insertion or removal of provisions which, under sub-section (68) of section 2, are required to be included in the articles of a company in order to constitute it a private company;
 - (c) change in place of registered office outside the local limits of any city, town or village as specified in sub-section (5) of section 12;
 - (d) change in objects for which a company has raised money from public through prospectus and still has any unutilized amount out of the money so raised under sub-section (8) of section 13;
 - (e) issue of shares with differential rights as to voting or dividend or otherwise under sub-clause (ii) of clause (a) of section 43;
 - (f) variation in the rights attached to a class of shares or debentures or other securities as specified under section 48;
 - (g) buy-back of shares by a company under sub-section (1) of section 68;
 - (h) election of a director under section 151 of the Act;
 - (i) sale of the whole or substantially the whole of an undertaking of a company as specified under sub-clause (a) of sub-section (1) of section 180;
 - (j) giving loans or extending guarantee or providing security in excess of the limit specified under sub-section (3) of section 186;

Exception: Provided that One Person Company and other companies having members upto two hundred are not required to transact any business through postal ballot.

4.14 Minutes

The minutes represent a written record of business transacted at a meeting. It is obligatory for every company to cause minutes of all proceedings of the general meetings, meeting of Board of Directors and other meeting and resolutions passed by postal ballot to be entered in the Minute Book. The minutes of each meeting contain a fair and correct summary of the proceedings. The appointment of officers made at the meeting will have to be included in the minutes.

The provision given in the section 118 of the Companies Act, 2013 deal with the minutes of proceedings of general meeting, meeting of Board of Directors and other meeting and resolutions passed by postal ballot. According to the provision-

- (1) **Preparation of the minutes of the proceedings of meetings:** Every company shall cause minutes of the proceedings of every general meeting of any class of shareholders or creditors, and every resolution passed by postal ballot and every meeting of its Board of Directors or of every committee of the Board, to be prepared and signed in such manner as may be prescribed and kept within thirty days of the conclusion of every such meeting concerned, or passing of resolution by postal ballot in books kept for that purpose with their pages consecutively numbered.
- (2) **Contain fair and correct summary:** The minutes of each meeting shall contain a fair and correct summary of the proceedings thereat.
- (3) **Appointments to be included in the minutes:** All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting.
- (4) **Other details :** In the case of a meeting of the Board of Directors or of a committee of the Board, the minutes shall also contain—
 - (a) the names of the directors present at the meeting; and
 - (b) **in the case of each resolution passed at the meeting**, the names of the directors, if any, dissenting from, or not concurring with the resolution.
- (5) **Exemptions to matters from inclusion in the minutes:** There shall not be included in the minutes, any matter which, in the opinion of the Chairman of the meeting,—
 - (a) is or could reasonably be regarded as **defamatory of any person**; or
 - (b) is **irrelevant or immaterial to the proceedings**; or
 - (c) is **detrimental to the interests of the company**.
- (6) **Absolute discretion of chairman:** The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds specified in sub-section (5).
- (7) **Considered as evidence of the proceedings:** The minutes kept in accordance with the provisions of this section shall be evidence of the proceedings recorded therein.

- (8) **Minutes signifies the validity of the procedure:** Where the minutes have been kept in accordance with sub-section (1) then, until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have been duly taken place, and the resolutions passed by postal ballot to have been duly passed and in particular, all appointments of directors, key managerial personnel, auditors or company secretary in practice, shall be deemed to be valid.
- (9) **Matter contained in the minutes shall be circulated:** No document purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters required by this section to be contained in the minutes of the proceedings of such meeting.
- (10) **Adherence of secretarial standards by company:** Every company shall observe secretarial standards with respect to general and Board meetings specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980, and approved as such by the Central Government.
- (11) **Default in compliance:** If any default is made in complying with the provisions of this section in respect of any meeting, the company shall be liable to a penalty of twenty-five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees.
- (12) **Tampering with the minutes:** If a person is found guilty of tampering with the minutes of the proceedings of meeting, he shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

In the case of the meeting of the Board or of a committee thereof, the minutes must contain the names of directors present there at and the names of directors who dissent from or do not concur with the resolution. It, therefore, follows that a director can insist that his dissent be recorded in the minutes of the Board meeting. But the director cannot so insist in the case of a general meeting, as Section 118(4) makes no such provision.

The chairman of the meeting has, however, unfettered discretion on the matter of excluding from the minutes any matter which could reasonable be regarded as defamatory of any person, or is irrelevant or immaterial, or detrimental to the interests of the company (Section 118(5)). The minutes of the meeting must contain a fair and correct summary of the proceedings thereat. But it is not necessary unless it affects fairness to *mention* the names of members who participated in such discussion.

Minutes must be entered in the minute book within 30 days of the conclusion of the meeting concerned. They have to be written by hand and typed minutes cannot be pasted in the Minute Book. Ordinarily minutes cannot be kept in loose-leaf system. The Ministry of Corporate Affairs, however, has expressed that it would refrain from taking any action against a company which maintained its minutes in the loose-leaf form provided adequate safeguards are taken against falsification, and loose-leaves are bound in books at reasonable interval. Every page

of the book, with pages consecutively numbered, should be initialed or signed and the last page shall be dated and signed: (a) in the case of Board or Committee minutes, by the Chairman of the said meeting or the Chairman of the next succeeding meeting; (b) in the case of minutes of general meeting, by the Chairman of the meeting within the aforesaid period of 30 days of the conclusion of the meeting or in the event of death or inability of the Chairman, by the Director duly authorised for the purpose.

In this context let us consider a concrete case. The chairmen of the Board, having presided over the company's annual general meeting, left India immediately thereafter. He is likely to come back only after a couple of months. Now how are the minutes to be signed and dated? By virtue of Section 118, minutes of proceedings of general meeting can be signed and dated within a period of 30 days, by a director duly authorised by the Board for the purpose. In the circumstances contemplated by the question, therefore, a Board meeting has to be convened and one of the directors present thereat be authorised to sign and date the minutes of the annual general meeting.

Any such minutes, when kept according to provisions mentioned above, are evidence of the proceedings (Section 118). It has been held in *Kerr Vs. Motiram (1940) 1CH 657* that should the articles provide that the minutes signed by the Chairman shall be conclusive evidence without any further proof of the facts therein stated, evidence cannot be led in to contradict the minutes.

A director, who is present at a meeting at which the minutes of a prior board meeting are confirmed, is not thereby made responsible for what was done at prior meeting [*Re land Allotment Co. 1894 1 Ch. 615*].

According to the rule given on the minutes of proceedings of general meeting, meeting of Board of Directors and other meetings and resolutions passed by postal ballot under the Companies (Management and administration) rules, 2014-

(a) **A distinct minute book shall be maintained** for each type of meeting namely:-

- (i) general meetings of the members;
- (ii) meetings of the creditors
- (iii) meetings of the Board; and
- (iv) meetings of each of the committees of the Board.

Whereas the resolutions passed by postal ballot shall be recorded in the minute book of general meetings as if it has been deemed to be passed in the general meeting.

- (b) **The minutes of proceedings of each meeting shall be entered in the books** maintained for that purpose along with the date of such entry within thirty days of the conclusion of the meeting.
- (c) In case of **every resolution passed by postal ballot**, a brief report on the postal ballot conducted including the resolution proposed, the result of the voting thereon and the

summary of the scrutinizer's report shall be entered in the minutes book of general meetings along with the date of such entry within thirty days from the date of passing of resolution.

- (d) **Each page of every such book shall be initialed or signed** and the last page of the record of proceedings of each meeting or each report in such books shall be dated and signed –
 - (i) in the **case of minutes of proceedings of a meeting of the Board or of a committee** thereof- by the chairman of the said meeting or the chairman of the next succeeding meeting;
 - (ii) in the **case of minutes of proceedings of a general meeting**- by the chairman of the same meeting within the aforesaid period of thirty days or in the event of the death or inability of that chairman within that period- by a director duly authorised by the Board for the purpose;
 - (iii) In case of every **resolution passed by postal ballot**- by the chairman of the Board within the aforesaid period of thirty days or in the event of there being no chairman of the Board or the death or inability of that chairman within that period- by a director duly authorized by the Board for the purpose.
- (e) The minute books of general meetings, shall be **kept at the registered office of the company and shall be preserved permanently** and kept in the custody of the company secretary or any director duly authorised by the board or at such other place as may be approved by the Board.
- (f) The **minutes books of the Board and committee meetings** shall be preserved permanently and kept in the custody of **the company secretary of the company or any director** duly authorized by the Board for the purpose and shall be kept in the registered office or such place as Board may decide.

Inspection of minute-books of general meeting: Section 119 of the Companies Act, 2013 provides that the minutes book of general meetings shall be open for the inspection to members subject to such restrictions as the company may impose. The provision says the following-

- (1) **Maintenance of minutes books and its inspection:** The books containing the minutes of the proceedings of any general meeting of a company or of a resolution passed by postal ballot, shall—
 - (a) be kept at the registered office of the company; and
 - (b) be open, during business hours, to the inspection by any member without charge, subject to such reasonable restrictions as the company may, by its articles or in general meeting, impose, so, however, that not less than two hours in each business day are allowed for inspection.

- (2) **Issue of copy of minutes to the member:** Any member shall be entitled to be furnished, within seven working days after he has made a request in that behalf to the company, and on payment of such fees as may be prescribed, with a copy of any minutes referred to in sub-section (1).
- (3) **Refusal of inspection or furnishing of copy of minutes:** If any inspection under sub-section (1) is refused, or if any copy required under sub-section (2) is not furnished within the time specified therein, the company shall be liable to a penalty of twenty-five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees for each such refusal or default, as the case may be.
- (4) **In case of default:** In the case of any such refusal or default, the Tribunal may, without prejudice to any action being taken under sub-section (3), by order, direct an immediate inspection of the minute-books or direct that the copy required shall forthwith be sent to the person requiring it.

4.15 Maintenance and inspection of documents in electronic form

According to section 120 of the Companies Act, 2013, where any document, record, register, minutes, etc.,—

- (a) required to be kept by a company; or
- (b) allowed to be inspected or copies to be given to any person by a company under this Act, may be kept or inspected or copies given, as the case may be, in electronic form in such form and manner as may be prescribed.

According to the rules provided on the maintenance and inspection of document in electronic form under the Companies (Management and Administration) rules, 2014 –

- (1) **Companies required to maintain the documents in electronic form:** Every listed company or a company having not less than one thousand shareholders, debenture holders and other security holders, shall maintain its records, as required to be maintained under the Act or rules made there under, in electronic form.

Explanation.- For the purposes of this sub-rule, it is hereby clarified that in case of existing companies, data may be converted from physical mode to electronic mode within six months from the date of notification of provisions of section 120 of the Act. (2) **Maintenance of records according to the Board of Directors:** The records in electronic form shall be maintained in such manner as the Board of directors of the company may think fit,

Provided that -

- (a) the records are maintained in the same formats and in accordance with all other requirements as provided in the Act or the rules made there under;

- (b) the information as required under the provisions of the Act or the rules made there under should be adequately recorded for future reference;
- (c) the records must be capable of being readable, retrievable and reproducible in printed form;
- (d) the records are capable of being dated and signed digitally wherever it is required under the provisions of the Act or the rules made there under;
- (e) the records, once dated and signed digitally, shall not be capable of being edited or altered;
- (f) the records shall be capable of being updated, according to the provisions of the Act or the rules made there under, and the date of updating shall be capable of being recorded on every updating.

Explanation: - For the purpose of this rule, the term "records" means any register, index, agreement, memorandum, minutes or any other document required by the Act or the rules made there under to be kept by a company.

4.16 Report on annual general meeting.

Section 121 of the Companies Act, 2013 provides the preparation of report on each annual general meeting which is to be filed with the registrar. The section says that-

- (1) **Report to be prepared by the listed public company:** Every listed public company shall prepare in the prescribed manner a report on each annual general meeting including the confirmation to the effect that the meeting was convened, held and conducted as per the provisions of this Act and the rules made thereunder.
- (2) **Filing of the report with the registrar:** The company shall file with the Registrar a copy of the report within thirty days of the conclusion of the annual general meeting with such fees as may be prescribed, or with such additional fees as may be prescribed, within the time as specified, under section 403.
- (3) **Default in filing of the report:** If the company fails to file the before the expiry of the period specified under section 403 with additional fee, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

The rules provided on the Report on Annual General Meeting given under the Companies(Management and administration) rules, 2014 says that-

- (1) The report according to the provisions of section 121(1), shall be prepared in the following manner, namely:-

- (a) the report under this section shall be prepared in addition to the minutes of the general meeting;
 - (b) the report shall be signed and dated by the Chairman of the meeting or in case of his inability to sign, by any two directors of the company, one of whom shall be the Managing director, if there is one and company secretary of the company;
 - (c) the report shall contain the details in respect of the following, namely:-
 - (i) the day, date, hour and venue of the annual general meeting;
 - (ii) confirmation with respect to appointment of Chairman of the meeting;
 - (iii) number of members attending the meeting;
 - (iv) confirmation of quorum;
 - (v) confirmation with respect to compliance of the Act and the Rules, secretarial standards made there under with respect to calling, convening and conducting the meeting;
 - (vi) business transacted at the meeting and result thereof;
 - (vii) particulars with respect to any adjournment, postponement of meeting, change in venue; and
 - (viii) any other points relevant for inclusion in the report.
 - (d) the Report shall contain fair and correct summary of the proceedings of the meeting.
- (2) The copy of the report as prepared above, shall be filed with the Registrar in prescribed Form within thirty days of the conclusion of the annual general meeting along with the fee.

4.17 Applicability of this Chapter to One Person Company

Section 122 of the Companies Act, 2013 lays that the provisions of some sections of this chapter VII (Management and Administration), shall be applicable to one person company to the extent and the manner as provided under the section.

Section provides that-

- (1) The provisions of section 98 (not yet notified) and sections 100 to 111 (both inclusive) shall not apply to a One Person Company.
- (2) The ordinary businesses as mentioned under clause (a) of sub-section (2) of section 102 which a company, other than a One Person Company, is required to transact at its annual general meeting, shall be transacted, in case of One Person Company, as provided in sub-section (3).
- (3) For the purposes of section 114, any business which is required to be transacted at an annual general meeting or other general meeting of a company by means of an ordinary

or special resolution, it shall be sufficient if, in case of One Person Company, the resolution is communicated by the member to the company and entered in the minutes-book required to be maintained under section 118 and signed and dated by the member and such date shall be deemed to be the date of the meeting for all the purposes under this Act.

- (4) Notwithstanding anything in this Act, where there is only one director on the Board of Director of a One Person Company, any business which is required to be transacted at the meeting of the Board of Directors of a company, it shall be sufficient if, in case of such One Person Company, the resolution by such director is entered in the minutes-book required to be maintained under section 118 and signed and dated by such director and such date shall be deemed to be the date of the meeting of the Board of Directors for all the purposes under this Act.

4.18 Meeting of Debenture Holders

A company having power to borrow money may do so, subject to its memorandum and articles, in any way in which an individual can borrow. Where it wishes to operate with borrowed money forming part of its permanent capital structure, the borrowing, however, is usually effected by means of the issue of debentures or debenture stock.

The term of issue of debentures frequently and trust deeds invariably contain provisions for meetings of the debenture-holders or debenture stockholders. Such meetings are desirable not merely for the discussion of the debenture-holders' interests, and the ascertainment of their wishes at a time of crisis or when some modification or rearrangement is proposed by the company, but also to give effect to those wishes by means of resolutions binding on the whole body of debenture-holders.

One of the most common purpose for which the machinery of debenture-holders' meetings is employed is to effect a modification or compromise of rights between the company and the debenture-holders. From time to time occasions arises which call for some renunciation or modification by the debenture-holders of their strict rights. It may be desirable or expedient, for example, to release particular property from the specific charge (with or without the substitution of other property), or to reduce the amount of the debenture interest, or to defer its payment for a time, or to allow the creation of debentures ranking in priority to the existing debentures, or *pari passu* with them, or to release the company for a limited period from all obligations to set apart profits towards a sinking fund, or to effect an exchange of debentures for equity or preference shares. To facilitate this, there is commonly inserted in trust deeds, and often in simple debenture, a clause enabling a specified majority of the debenture-holders or debenture stockholders, by resolution, to bind the whole body to a compromise with the company in respect of their rights, or in respect of the subject-matter of the security. The convenience of such a clause is obvious; in respect of the subjected-matter of the security. The convenience of such a clause is obvious; or it enables the company to deal with the debenture, holders as a class, and prevents a few perverse or adversely interested debenture

holders from obstructing a necessary or desirable arrangement. The Power must be exercised bona fide for the benefit of the whole class [*British America Nickel Crpn. Vs. O'Brien (1927) AC 369,PC*].

Sections 101 to 104 and Sections 106 to 107 with such adaptations and modifications, if any, as may be prescribed, shall apply with respect to meetings of debenture-holders or any class of debenture-holders of a company, in like manner as they apply to general meetings of the company.

4.19 Company Law in A Computerized Environment

Section 398 of the Companies Act, 2013 empowers the Central Government to make rules in regard to filing of various applications, documents, returns etc. service or delivery of documents, notice or communication etc., maintenance of various applications, documents and returns filed etc. in the electronic form.

Ministry of Company Affairs (MCA), has initiated MCA 21 program, for easy and secure access to MCA services in a manner that best suits the businesses and citizens.

The program goals have been set as follows keeping in mind stakeholders' needs:

- ◆ **Business** shall be enabled to register a company and file statutory documents quickly and easily
- ◆ **Public** to get easy access to relevant records and effective grievances redressal
- ◆ **Professionals** to be able to offer efficient services to their client companies
- ◆ **Financial Institutions** to easily find charges registration and verification
- ◆ **Employees** to ensure proactive and effective compliance of relevant laws and corporate governance

Procedure of electronic filing: In order to carry out e-filing on MCA21 you have facility to download the eform and fill it in an offline mode. Every form has the facility to pre-fill the data available in MCA21 system. Once the e-form is filled you would need to validate the e-form using Pre-scrutiny button. You would then have to affix the relevant digital signatures and save the form. You would need to be connected to the internet to carry out the pre-fill and pre-scrutiny functions. The step by step process is given below. The filled up e-form as per relevant instruction kit needs to be uploaded on the MCA21 portal. On successful upload, the Service request number would be generated and you would be directed to make payment of the statutory fees. The step by step process is given below. Once the payment has been made the status of your payment and filing status can be tracked on the MCA21 portal by using the 'Track Your Payment Status' and 'Track Your Transaction Status' link respectively.

Steps for the e-filing: Following are the steps given below to proceed to do eFiling:

1. Select a category to download an eForm from the MCA 21portal (with or without the instruction kit)

2. At any time, can read the related instruction kit to familiarize with the procedures (download the instruction kit with eform or view it under Help menu).
3. Fill the downloaded eForm.
4. Attach the necessary documents as attachments.
5. Use the Prefill button in eForm to populate the grayed out portion by connecting to the Internet.
6. The applicant or a representative of the applicant needs to sign the document using a digital signature.
7. Need to click the Check Form button available in the eForm. System will check the mandatory fields, mandatory attachment(s) and digital signature(s).
8. Upload the eForm for pre-scrutiny. The pre-scrutiny service is available under the Services tab or under the eForms tab by clicking the Upload eForm button. The system will verify (pre-scrutinize) the documents. In case of any inadequacies, the user will be asked to rectify the mistakes before getting the document ready for execution (signature).
9. The system will calculate the fee, including late payment fees based on the due date of filing, if applicable.
10. Payments will have to be made through appropriate mechanisms - electronic (credit card, Internet banking) or traditional means (at the bank counter through challan).
 - (a) Electronic payments can be made at the Virtual Front Office (VFO) or at PFO
 - (b) If the user selects the traditional payment option, the system will generate 3 copies of pre-filled challan in the prescribed format. Traditional payments through cash, cheques can be done at the designated network of banks using the system generated challan. There will be five banks with estimated 200 branches authorized for accepting challan payments.
11. The payment will be exclusively confirmed for all online (Internet) payment transactions using payment gateways.
12. Acceptance or rejection of any transaction will be explicitly communicated to the applicant (including facility to print a receipt for successful transactions).
13. MCA21 will provide a unique transaction number, the Service Request Number (SRN) which can be used by the applicant for enquiring the status pertaining to that transaction.
14. Filing will be complete only when the necessary payments are made.
15. In case of a rejection, helpful remedial tips will be provided to the applicant.
16. The applicants will be provided an acknowledgement through e-mail or alternatively they can check the MCA portal.

Program Scope

MCA 21 program will provide for anytime anywhere electronic services with speed and certainty to all the stakeholders. It will include:

- ◆ Design and development of application system
- ◆ Setting up of IT infrastructure
- ◆ Setting up the Digital Signature/PKI delivery mechanisms and associated security requirements
- ◆ Setting up of Physical Front Offices (PFOs)
- ◆ Setting up of temporary FOs for the peak periods to meet with the requirements and subsequent shutdown of temporary FOs at the end of such peak periods
- ◆ Migrating legacy data and digitization of paper documents to the new system
- ◆ Providing MCA services to all MCA 21 stakeholders in accordance with the Service Oriented Approach
- ◆ Providing user training at all levels and all offices (Front and Back Offices)

The MCA 21 is designed to automate processes related to the proactive enforcement and compliance of the legal requirements under the Companies Act, 1956. However, it does not include processes related to OL.

Key Benefits

MCA 21 seeks to fulfill the requirements of the various stakeholders. The key benefits of MCA 21 project are the back office process relates to:

- ◆ Expeditious incorporation of companies
- ◆ Simplified and ease of convenience in filing of Forms/ Returns
- ◆ Better compliance management
- ◆ Total transparency through e-Governance
- ◆ Customer centric approach
- ◆ Increased usage of professional certificate for ensuring authenticity and reliability of the Forms / Returns
- ◆ Building up a centralised database repository of corporate operating
- ◆ Enhanced service level fulfillment
- ◆ Inspection of public documents of companies anytime from anywhere
- ◆ Registration as well as verification of charges anytime from anywhere
- ◆ Timely redressal of investor grievances
- ◆ Availability of more time for MCA employees for monitoring and supervision.

The MCA-21 Programme also introduces the concept of Director Identification Number (DIN),

which is a unique identification number being issued to all directors. All directors, be it those of existing companies or first time directors, will need to register themselves online for obtaining the DIN.

Annexure

Sections which are yet to be notified

97. Power of Tribunal to call annual general meeting

- (1) If any default is made in holding the annual general meeting of a company under section 96, the Tribunal may, notwithstanding anything contained in this Act or the articles of the company, on the application of any member of the company, call, or direct the calling of, an annual general meeting of the company and give such ancillary or consequential directions as the Tribunal thinks expedient:

Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

- (2) A general meeting held in pursuance of sub-section (1) shall, subject to any directions of the Tribunal, be deemed to be an annual general meeting of the company under this Act.

98. Power of Tribunal to call meetings of members, etc.

- (1) If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the articles of the company, the Tribunal may, either *suo motu* or on the application of any director or member of the company who would be entitled to vote at the meeting,—

- (a) order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit; and
- (b) give such ancillary or consequential directions as the Tribunal thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act or articles of the company:

Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

- (2) Any meeting called, held and conducted in accordance with any order made under sub-section (1) shall, for all purposes, be deemed to be a meeting of the company duly called, held and conducted.

99. Punishment for default in complying with provisions of sections 96 to 98.

If any default is made in holding a meeting of the company in accordance with section 96 or section 97 or section 98 or in complying with any directions of the Tribunal, the company and every officer of the company who is in default shall be punishable with fine which may extend to one lakh rupees and in the case of a continuing default, with a further fine which may extend to five thousand rupees for every day during which such default continues.